No. 16-961	
Title:	**Nicole A. Dalmazzi, Petitioner** **v.** **United States**
Docketed:	February 2, 2017
Lower Ct:	United States Court of Appeals for the Armed Forces
Case Numbers:	(16-0651)
Decision Date:	December 15, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 01 2017	Petition for a writ of certiorari filed. (Response due March 6, 2017)
Feb 09 2017	Waiver of right of respondent United States to respond filed.
Feb 15 2017	DISTRIBUTED for Conference of March 3, 2017.
Feb 22 2017	Response Requested. (Due March 24, 2017)
Feb 24 2017	Supplemental brief of petitioner Nicole A. Dalmazzi filed.
Mar 16 2017	Order extending time to file response to petition to and including April 24, 2017.
Apr 19 2017	Order further extending time to file response to petition to and including May 15, 2017.
May 15 2017	Brief of respondent United States in opposition filed. VIDED.
May 19 2017	Reply of petitioner Nicole A. Dalmazzi filed. VIDED.
Sep 06 2017	DISTRIBUTED for Conference of 9/25/2017.
Sep 28 2017	Petition GRANTED, and the petitions for writs of certiorari in Nos. 16-1017 and 16-1423 are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether this

	Court has jurisdiction to review the cases in Nos. 16-961 and 16-1017 under 28 U. S. C. § 1259(3).
Nov 07 2017	Joint appendix filed. VIDED. (Statement of costs filed)
Nov 07 2017	Brief of petitioners filed. VIDED.
Nov 14 2017	Brief amicus curiae of Aditya Bamzai in support of neither party filed. VIDED. **Certificate of Word Count** **Main Document** **Proof of Service**
Nov 17 2017	SET FOR ARGUMENT ON Tuesday, January 16, 2018. VIDED
Nov 22 2017	CIRCULATED.
Dec 07 2017	Brief of respondent United States filed. VIDED. **Proof of Service** **Main Document**
Dec 14 2017	Motion of Aditya Bamzai for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED. **Main Document** **Proof of Service**
Jan 05 2018	Motion of Professor Aditya Bamzai for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument GRANTED, and the time is divided as follows: 30 minutes for petitioners, 10 minutes for Professor Aditya Bamzai, and 30 minutes for respondent. VIDED
Jan 05 2018	Reply of petitioner Nicole A.Dalmazzi filed. VIDED. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Jan 10 2018	Letter of respondent United States filed. VIDED. (Distributed) **Main Document**
Jan 16 2018	Argued. For petitioners: Stephen I. Vladeck, Austin, Tex. For Professor Aditya Bamzai as amicus curiae: Aditya Bamzai, Charlottesville, VA. For respondent: Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D. C. VIDED.

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RECORD AND BRIEFS

16-961

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No. 16-____

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required express authorization from Congress before active-duty military officers may hold a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

After President Obama nominated and the Senate confirmed Colonel Martin T. Mitchell as a judge of the Article I U.S. Court of Military Commission Review (CMCR), Judge Mitchell continued to serve on the U.S. Air Force Court of Criminal Appeals (AFCCA). The U.S. Court of Appeals for the Armed Forces (CAAF) rejected as moot Petitioner's challenge to Judge Mitchell's continued service on the AFCCA, because his CMCR commission had not been signed until after the AFCCA decided her case on the merits—even though she moved for reconsideration after the commission was signed.

The Questions Presented are:

1. Whether the Court of Appeals erred in holding that Petitioner's claims were moot.
2. Whether Judge Mitchell's service on the CMCR disqualified him from continuing to serve on the AFCCA under 10 U.S.C. § 973(b)(2)(A)(ii).
3. Whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

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PETITION FOR A WRIT OF CERTIORARI

Air Force Second Lieutenant Nicole A. Dalmazzi respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted in the Appendix at Pet. App. 1a. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is reprinted in the Appendix at Pet. App. 10a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on August 18, 2016, *United States* v. *Dalmazzi*, 75 M.J. 434 (C.A.A.F. 2016) (mem.), and issued a final decision on December 15, 2016. This Court therefore has jurisdiction under 28 U.S.C. § 1259(3).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

> shall nominate, and by and with the advice and consent of the Senate, shall

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1. After it granted review, received plenary briefs, and heard oral argument, the Court of Appeals issued a decision at the end of which it vacated the grant and purported to deny Lieutenant Dalmazzi's petition. Pet. App. 7a. But this Court has appellate jurisdiction over all "[c]ases in which [CAAF] granted a petition for review under section 867(a)(3) of title 10." The Court of Appeals' grant of review brings this case within the plain meaning of that provision.

> appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. CONST. art. II, § 2, cl. 2.

As relevant here, the military dual-officeholding statute provides that:

> Except as otherwise authorized by law, an officer to whom this subsection applies [including "a regular officer of an armed force on the active-duty list"] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate.

10 U.S.C. § 973(b)(2)(A)(ii).

STATEMENT OF THE CASE

A. Legal Background

Since shortly after the Civil War, Congress has generally prohibited active-duty military officers from holding a second non-military position within the Executive Branch. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319.[2] Although subsequent

2. The ban has been extended in some cases, including to require waiting periods before former officers can hold particular

measures have carved out a handful of express exceptions to this dual-officeholding ban, the general prohibition remains in force. *See* 10 U.S.C. § 973(b).

More than an antiquated technical provision, the dual-officeholding ban is designed "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also Memorandum for the General Counsel, Gen. Servs. Admin.*, 3 OP. O.L.C. 148, 150 (Apr. 10, 1979) ("That section embodies an important policy designed to maintain civilian control of the Government.").

Among other things, the current version of § 973(b) makes it unlawful for an active-duty military officer to "hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate," except where such service is "otherwise authorized by law." 10 U.S.C. § 973(b)(2)(A)(ii). Thus, as relevant here, the dual-officeholding ban applies to all "civil offices" held either by principal Executive Branch officers, *see Myers* v. *United States*, 272 U.S. 52 (1926), or by inferior officers whose appointment has not properly been vested in some other body. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring presidential nomination and Senate advice and consent for inferior officers the

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civilian positions, such as Secretary of Defense, 10 U.S.C. § 113(a), or to require that particular positions be held by civilians. *E.g.*, *id.* § 942(b)(1) (providing that CAAF judges "shall be appointed from civilian life by the President, by and with the advice and consent of the Senate").

appointment of whom Congress has not vested "in the President alone, in the courts of law, or in the heads of departments").

The dual-officeholding claim in this case arises from the unique structure of the U.S. Court of Military Commission Review (CMCR). That court was created by Congress in 2006 (and substantially reformed in 2009) to serve as an intermediate appellate court between military commissions convened under the Military Commissions Act (MCA), 10 U.S.C. §§ 948a–950t, and the U.S. Court of Appeals for the District of Columbia Circuit. *Id.* § 950f.

In the MCA, Congress provided two different mechanisms for staffing the CMCR with judges. First, the Secretary of Defense was empowered to "*assign* persons who are appellate military judges to be judges on the Court." *Id.* § 950f(b)(2) (emphasis added). This apparently refers to judges already serving on the service-branch-specific Courts of Criminal Appeals (CCAs) within the court-martial system. *See id.* § 866(a) (referring to "appellate military judges").

CCA judges are inferior Executive Branch officers for purposes of the Appointments Clause, *Edmond* v. *United States*, 520 U.S. 651 (1996), and may thus be "assigned" to the CCAs if they are already inferior Executive Branch officers, rather than "appointed" thereto. *See Weiss* v. *United States*, 510 U.S. 163 (1994). But because the CMCR, unlike the CCAs, is not subject to appellate (or other) supervision within the Executive Branch, CMCR judges are almost certainly principal Executive Branch officers, for reasons the D.C. Circuit detailed (while reserving a ruling) in *In re Al-Nashiri*, 791 F.3d 71, 82–85 (D.C. Cir. 2015).

CMCR judges therefore hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," 10 U.S.C. § 973(b)(2)(A)(ii), a conclusion the Executive Branch seems to share. Thus, in direct response to the D.C. Circuit's ruling in *Al-Nashiri* (and after initially having been "assigned" to the CMCR in 2014), Judge Mitchell was "appointed" to the court using the MCA's second staffing mechanism. *See* 10 U.S.C. § 950f(b)(3). That provision authorizes the President to "*appoint*, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* (emphasis added). Every judge to join the CMCR since the D.C. Circuit's ruling in *Al-Nashiri* has similarly been "appointed" to that court.[3]

CMCR judges also hold a "civil office." The political branches have long embraced "a very liberal interpretation of the phrase 'civil office,'" *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884), as a generic term originally meant simply to exempt an officer's subsequent promotion (and concomitant re-appointment *as* a military officer). Thus, if a civilian can hold the position, then it is a "civil office" for purposes of § 973(b)(2)(A)(ii). *See id.* § 950f(b)(3) (authorizing appointments of civilian judges to the CMCR); *see also* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall

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3. Even if CMCR judges are inferior officers, the appointment of active-duty military officers to such positions still triggers § 973(b)(2)(A)(ii) because *appointments* to the CMCR (unlike *assignments* to it) may only be made by the President "by and with the advice and consent of the Senate." *Id.* § 950f(b)(3); *accord id.* § 973(b)(2)(A)(ii).

have been created, or the emoluments whereof shall have been increased during such time . . . .").

Indeed, the breadth of the term "civil office" is exactly *why* Congress in 1983 added three narrowing conditions to § 973(b)—including the pertinent requirement here, *i.e.*, that the second position require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii); *see also Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 9–10 (Aug. 2, 2016) (describing the motivation and purpose of the 1983 amendments to § 973(b)).

Any doubt that CMCR judges hold a "civil office" is conclusively settled by the 2009 amendments to the MCA, which reconstituted that body as an Article I "court of record." 10 U.S.C. § 950f(a); *see also In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). As in *Freytag* v. *C.I.R.*, 501 U.S. 868 (1991), "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," *id.* at 888, the judges of which hold a quintessential "civil office." *See, e.g.*, *Winchell* v. *United States*, 28 Ct. Cl. 30, 35 (1892).

Nor is military officers' service as judges on the CMCR "otherwise authorized by law." Congress added that language in 1956 to reflect that "other laws enacted after the date of enactment of [5 U.S.C. § 5534a] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). What these other laws all have in common is clear and unambiguous indicia of Congress's intent to override the dual-

officeholding ban. *See, e.g.*, *id.* § 528 (expressly allowing appointment of certain military officers to positions within the CIA or the Office of the Director of National Intelligence). *See generally* Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 MIL. L. REV. 21, 85 (1958) (collecting examples).

In contrast, the MCA says nothing whatsoever about appointing military officers, as such, to serve in a "civil office" as CMCR judges. Indeed, the only language in § 950f that even appears to reference military officers is the authority provided to the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [CMCR]." 10 U.S.C. § 950f(b)(2) (emphasis added). Neither the text nor history of this provision does not provide the clear statement required to satisfy § 973(b).

With regard to the text, the term "appellate military judges" includes civilians. *See id.* § 866(a) ("Appellate military judges who are assigned to a [CCA] may be commissioned officers or civilians"). And even if Congress nevertheless meant to refer only to military officers, given the well-settled and constitutionally significant difference between the words "assign" and "appoint" in this context, the fact that § 950f(b)(2) refers to the former "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss*, 510 U.S. at 172 (emphasis added).

This understanding is confirmed by the history of § 950f(b)(2), which was first codified by the 2006 MCA—under which the CMCR was not a court of record. If Congress did not express any intent to

override § 973(b) when it created the CMCR in 2006, such an intent cannot be inferred simply from the reenactment of the same language as part of the 2009 overhaul of the MCA.

Despite these understandings, three of the five judges currently appointed to the CMCR also serve as active-duty military officers (and, indeed, active judges of the Army Court of Criminal Appeals), regularly hearing cases on both courts. This Petition raises the legality and constitutionality of this novel arrangement.

B. Procedural History

Petitioner, a Second Lieutenant in the Air Force, entered a guilty plea before a general court-martial to wrongfully using ecstasy in violation of Article 112 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912. She was sentenced to a dismissal and one month of confinement. Because her sentence included a dismissal, the Judge Advocate General referred the case to the Air Force Court of Criminal Appeals (AFCCA), *see id.* § 866(b)(1), before which Petitioner argued that the charge should have been dismissed due to unlawful command influence. She also objected to the severity of the sentence.

On May 12, 2016,[4] a three-judge panel that included Judge Mitchell rejected Petitioner's appeal. Judge Mitchell had also been serving on the CMCR since October 28, 2014, when he was "assigned" thereto under 10 U.S.C. § 950f(b)(2). But after the D.C. Circuit in *Al-Nashiri* called into question the constitutionality of such an "assignment," he was

4. For ease of reference, a chronology of the key events is provided in the Appendix. *See* Pet. App. 28a.

nominated by President Obama under 10 U.S.C. § 950f(b)(3) to an "appointment" as an "additional judge" on the CMCR. 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (nomination of Colonel Mitchell to be CMCR judge "under 10 U.S.C. Section 950f(b)(3)"). The Senate confirmed him on April 28, 2016. *Id.* S2600 (daily ed. Apr. 28, 2016) (reporting confirmation).

Because of the dual-officeholding ban, Judge Mitchell's service on the CMCR should have immediately terminated his military status, thereby disqualifying him from hearing Lieutenant Dalmazzi's case. She pressed this argument in a motion for reconsideration filed with her AFCCA panel (including Judge Mitchell) on May 27, 2016, and again in the petition for review that the Court of Appeals for the Armed Forces granted. Pet. App. 3a.[5]

After full briefing and oral argument on the merits of Petitioner's challenge, the Court of Appeals issued an opinion holding that her objection was moot because President Obama did not formally sign Judge Mitchell's CMCR commission until May 25, 2016—13 days after the AFCCA decision in her case. *See* Pet.

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5. The Court of Appeals treats the 60-day time limit within which to file a petition for review, *see* 10 U.S.C. § 867(b), as jurisdictional. *United States* v. *Rodriguez*, 67 M.J. 110, 116 (C.A.A.F. 2009); *see also id.* at 116 n.10 (explaining why CAAF's approach differs from civilian criminal appeals). After waiting over six weeks for the AFCCA to rule on her motion for reconsideration, Petitioner petitioned for review by the Court of Appeals on July 11, 2016, in order to satisfy § 867(b). The AFCCA subsequently concluded that that CAAF petition deprived it of jurisdiction over her motion for reconsideration, which it dismissed on July 18, 2016. *See* Pet. App. 8a (citing *United States* v. *Riley*, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003)).

App. 7a ("As Colonel Mitchell had not yet been appointed a judge of the USCMCR at the time the judgment in Appellant's case was released, the case is moot as to these issues.").

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Misapplied the Wrong Doctrine in Rejecting Petitioner's Appeal

The Court of Appeals rejected Petitioner's appeal on mootness grounds, based upon a factually and legally indefensible application of the wrong doctrine. "As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted). Petitioner, whose sentence includes a dismissal from the Air Force, unquestionably has such an interest in pursuing the disqualification of Judge Mitchell from the AFCCA panel that upheld that punishment. Her appeal was emphatically not moot.

In our view, the Court of Appeals' concerns more properly sound in *standing* to challenge Judge Mitchell's participation, *i.e.*, whether Petitioner could claim a concrete injury arising from his service on the CMCR. *See, e.g.*, *Pashaian* v. *Eccelston Props., Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996) (discussing standing to seek a judge's disqualification). But even viewed through the proper doctrinal lens, the Court of Appeals' analysis failed to account for the dispositive facts of Petitioner's case or the plain text of the dual-officeholding ban.

On the facts, even if § 973(b)(2)(A)(ii) was not triggered until President Obama signed Judge Mitchell's CMCR commission on May 25, 2016,

Petitioner's motion for reconsideration before the AFCCA panel—which specifically challenged Judge Mitchell's role in her case—was filed two days later on May 27, and remained pending before the AFCCA for over six weeks before it was dismissed. *See ante* at 9 & n.5. Thus, even on the Court of Appeals' view, Judge Mitchell was still participating in Petitioner's case *after* President Obama signed his commission—by which point, if not sooner, he formally held his office as a CMCR judge.

On the law, the dual-officeholding ban applies to military officers who "hold" *or* "exercise the functions" of a civil office. *See* 10 U.S.C. § 973(b)(2)(A)(ii). Whether or not Judge Mitchell formally "held" the position of CMCR judge before President Obama signed his commission, there is no question that he "exercise[d] the functions" of that position at the same time he sat on Petitioner's AFCCA panel.

For example, on May 2, 2016 (10 days before deciding Petitioner's AFCCA appeal), Judge Mitchell took the oath of office as an "Appellate Judge" of the CMCR. Later that day, he joined in an order in a pending case. *See* Pet. App. 26a. And on May 18—still one week before President Obama signed his commission—Judge Mitchell participated in the CMCR's decision in *United States* v. *Al-Nashiri*, a decision that, more than a little ironically, rejected the argument that his appointment to the CMCR violated the dual-officeholding ban. *See* Pet. App. 18a.[6] Thus,

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6. In *Al-Nashiri*, the CMCR concluded, albeit summarily, that its judges do not hold a "civil office" under § 973(b) because they exercise a "classic military function." Pet. App. 24a. This *ipse dixit* failed to grapple with the liberal interpretation all three branches have long given to the term "civil office"; the presence of civilian CMCR judges (including one of the judges on

at the same time that he joined in an AFCCA decision rejecting Petitioner's appeal, Judge Mitchell was unquestionably "exercis[ing] the duties" of a CMCR judge in violation of 10 U.S.C. § 973(b)(2)(A)(ii).

II. The Court of Appeals' Error Warrants Reversal—and Its Massive (and Growing) Impact Warrants Plenary Review

The Court of Appeals' mootness analysis is much more than an isolated flaw calling for simple error correction. Already, the Court of Appeals has applied its decision in Petitioner's case to dismiss petitions for review it had granted in at least six additional appeals from CCAs raising dual-officeholding challenges. *See United States* v. *Cox*, No. 16-635 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *Miller*, No. 16-641 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *Craig*, No. 16-650 (C.A.A.F. Jan. 17, 2017) (mem.); *United States* v. *O'Shaughnessy*, No. 16-616 (C.A.A.F. Dec. 27, 2016) (mem.); *United States* v. *Morchinek*, No. 16-617 (C.A.A.F. Dec. 27, 2016) (mem.); *United States* v. *Lewis*, No. 16-660 (C.A.A.F. Dec. 27, 2016) (mem.).

As the growing list of additional cases suggests, there is no reason to believe the Court of Appeals will abandon the approach it mistakenly adopted in Petitioner's case. *See Tory* v. *Cochran*, 544 U.S. 734, 739–40 (2005) (Thomas, J., dissenting). In addition, that error has not only infected these additional cases; it has prevented the Court of Appeals from resolving

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the *Nashiri* panel); or the CMCR's status as an Article I "court of record." 10 U.S.C. § 950f(a). *See ante* at 5–6.

It is also telling that, even though the President had not yet signed Judge Mitchell's CMCR commission, it was not argued in *Al-Nashiri* (and the CMCR did not itself suggest) that, as CAAF held in this case, the § 973(b) claim was unavailable.

the merits of the dual-officeholding question. *See, e.g.*, *Anderson* v. *Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting). At the very least, then, this Court should summarily reverse and remand in order to afford the Court of Appeals an opportunity to reach and resolve the merits of Petitioner's challenge to Judge Mitchell's involvement in the AFCCA's review of her case.

And yet, although such a disposition would ordinarily be sufficient, this Petition is not ordinary; plenary briefing and argument are instead warranted on all three of the Questions Presented:

1. Well over 100 cases are already pending in the lower military courts raising the dual-officeholding questions presented here.[7] Moreover, because of the continuing service of three CMCR judges on the Army CCA, that number is growing by the day. The sooner Petitioner's dual-officeholding claim can be conclusively resolved, the easier it will be to sort out the consequences of such a ruling on cases currently pending in the Army CCA, the Court of Appeals, and the CMCR.

2. Even if the statutory dual-officeholding claim is resolved *against* the Petitioner, such a result would only provoke a host of difficult constitutional

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7. The Court of Appeals' current docket itself reflects over 80 pending cases raising the dual-officeholding question. *See* U.S. Court of Appeals for the Armed Forces, New Grants and Summary Dispositions (last updated Jan. 26, 2017), http://www.armfor.uscourts.gov/newcaaf/grants_disp.htm. As of the date of this filing, Counsel for the Petitioner are also aware of 21 additional petitions for review pending in the Court of Appeals that present dual-officeholding objections to decisions by the Army CCA. That number is growing by the day.

questions arising from the simultaneous service of an active-duty military officer on a CCA and the CMCR.

One problem with such simultaneous service arises from the Appointments Clause of Article II, since a CMCR judge who is also serving on one of the CCAs would be a principal officer (and Article I judge) serving alongside inferior (Article II) officers of equal authority. *Cf. Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting statutes to prohibit Article III and Article IV federal judges from serving on same court of appeals panel); *id.* at 83 n.17 (suggesting that allowing such mixed panels would "call into serious question the integrity as well as the public reputation of judicial proceedings").

Moreover, in his capacity as a CCA judge, such a principal officer would be subject, contrary to the Appointments Clause, to the direct supervisory authority of another principal officer, *i.e.*, the Judge Advocate General of the relevant service branch. *See Edmond*, 520 U.S. at 664 (discussing the JAG's authority over CCA judges). *But see Myers*, 272 U.S. at 126–28 (holding that principal officers must be subject to the direct and plenary control of the President).

A second problem arises from the Commander-in-Chief Clause of Article II—since CMCR judges appointed under 10 U.S.C. § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. As such, CMCR judges "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office," *i.e.*, they have "good-cause tenure." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 493 (2010).

Such a constraint on the President's power over active-duty military officers raises constitutional concerns of the first order. *E.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]"). Indeed, it is well settled that it would be unconstitutional for Congress to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1103–04 (2008). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from serving as CMCR judges, then the good-cause removal protection provided by 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.[8]

These constitutional considerations matter in two different but equally important respects: First, they provide yet further support for Petitioner's statutory claim—that the dual-officeholding ban forbids active-duty military officers from serving as CMCR judges. Indeed, the strength of the Appointments Clause and Commander-in-Chief Clause objections should necessarily resolve any ambiguity in § 973(b)(2)(A)(ii) in favor of *prohibiting* active-duty military officers

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8. The Questions Presented do not include the Commander-in-Chief Clause claim because Petitioner has no standing to object to Judge Mitchell's service on the CMCR, as such. But the very real possibility that such service might violate the Commander-in-Chief Clause both bolsters her statutory argument and underscores the need for this Court, rather than the Court of Appeals (which has no authority over the CMCR), to settle the matter.

from serving as CMCR judges. Put another way, if Petitioner is correct that Judge Mitchell's service on the CMCR triggered the dual-officeholding ban (thereby terminating him from the military and disqualifying him from the Petitioner's AFCCA panel *nunc pro tunc*),[9] Petitioner's constitutional objections disappear.

Second, these constitutional questions also suggest that, until the statutory challenge is conclusively resolved, there will continue to be panels of both the CCAs and the CMCR that are exercising authority not just in potential violation of 10 U.S.C. § 973(b)(2)(A)(ii), but in violation of two different provisions of Article II as well.[10] Even if the Court of Appeals in this (or another) case is able to resolve the merits of Petitioner's dual-officeholding challenge, such a holding would not affect the CMCR's prior rejection of such a claim in *Al-Nashiri*—which may not be subject to further appellate review anytime soon.[11]

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9. Civilians may serve on the CCAs, 10 U.S.C. § 866(a), but they must be appointed by the President and confirmed by the Senate. *See United States* v. *Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014). Judge Mitchell was not so appointed.

10. Nor can decisions by such unlawfully constituted panels be salvaged by application of the *de facto* officer doctrine. This Court specifically rejected application of that doctrine to a claim that civilians were unconstitutionally serving on predecessors to the CCAs in *Ryder* v. *United States*, 515 U.S. 177 (1995). And CAAF has held that the *de facto* officer doctrine is inapplicable where, as here, a defendant timely challenges a judge's legal authority to sit on a CCA panel. *United States* v. *Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015).

11. Although the D.C. Circuit has appellate jurisdiction over the CMCR, that jurisdiction only allows it to entertain appeals from "a final judgment rendered by a military commission (as

3. Finally, the ultimate remedy for a violation of the dual-officeholding ban—the officer's immediate termination from the military—is beyond the Court of Appeals' power to direct. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 535 & n.7 (1999). Of course, that fact poses no obstacle to Petitioner's ability to obtain from the Court of Appeals the specific relief she seeks—Judge Mitchell's disqualification from her AFCCA panel. But it does underscore, more broadly, the extent to which only this Court can conclusively resolve the plethora of thorny but persistent questions raised by the appointment of active-duty military officers as CMCR judges.[12]

* * *

As the Chief Justice explained for a unanimous Court in *Munaf* v. *Geren*, even when straightforward resolution of a threshold procedural issue may settle the lower courts' error, "There are occasions . . . when

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approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR])." 10 U.S.C. § 950g(a); *see Khadr* v. *United States*, 528 F.3d 1112 (D.C. Cir. 2008). Thus, the CMCR's rejection of the dual-officeholding challenge in *Al-Nashiri*, *see ante* at 11 & n.5, is effectively unreviewable by the D.C. Circuit until after the CMCR has ruled on Nashiri's (or another affected defendant's) post-conviction appeal—which may not be for many years. *See In re Al-Nashiri*, 835 F.3d 110, 134 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-___ (U.S. Jan. __, 2017).

12. In addition to the questions raised by the service of active-duty military officers as CMCR judges, the D.C. Circuit has also flagged "a serious issue" involving *civilian* CMCR judges, at least some of whom have continued to engage in the private practice of law without express statutory authorization to do so, despite the clear ban on such conduct in 18 U.S.C. § 203(a). *See Khadr*, 823 F.3d at 99–100.

it is appropriate to proceed further and address the merits. This is one of them." 553 U.S. 674, 691 (2008).

The same is true here.

Because of the posture in which this case reaches the Court, the more-than-100 pending cases that now turn on the resolution of Petitioner's dual-officeholding challenge, the significance of the constitutional questions that challenge implicates, and the difficulties the lower courts will have in conclusively settling the matter without this Court's intervention, certiorari is imperative.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

February 1, 2017

No. 16-___

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES, Appellee
v.

Nicole A. DALMAZZI, Second Lieutenant
U.S. Air Force, Appellant

No. 16-0651

Crim. App. No. 38808

United States Court of Appeals for the Armed Forces

Argued December 7, 2016

Decided December 15, 2016

Military Judge: L. Martin Powell

For Appellant: *Major Johnathan D. Legg* (argued), *Brian L. Mizer,* Esq. (on brief); *Major Thomas A. Smith.*

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce,* Esq. (on brief).

Amici Curiae for Appellee: *Colonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, Major Anne C. Hsieh, Captain Carling M. Dunham, and Captain Samuel E. Landes* (on brief)—for Army Government Appellate Division. *Colonel Valerie C. Danyluk,* USMC, *Lieutenant Commander Justin C. Henderson,* JAGC, USN, *Lieutenant James M. Belforti,* JAGC,

USN, and *Brian K. Keller*, Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Brigadier General John G. Baker*, USMC, *Captain Brent G. Filbert*, JAGC, USN, and *Philip Sundel*, Esq. (on brief)—for Military Commissions Defense Organization.

PER CURIAM:

The issues presented are whether a military officer is statutorily or constitutionally prohibited from simultaneously serving as an appellate military judge on a service court of criminal appeals and as a judge on the United States Court of Military Commission Review (USCMCR). As the appellate military judge who participated in deciding Appellant's case had not yet been appointed a USCMCR judge, we hold that the case is moot as to these issues.

I. Procedural History

A military judge sitting alone convicted Appellant, in accordance with her pleas, of wrongfully using ecstasy, a Schedule I, controlled substance. The convening authority approved the adjudged sentence: a dismissal and confinement for one month. The United States Air Force Court of Criminal Appeals (CCA) affirmed the approved findings and sentence. *United States v. Dalmazzi*, ACM No. 38808, 2016 CCA LEXIS 307, at *7–8, 2016 WL 3193181, at *3 (A.F. Ct. Crim. App. May 12, 2016).

On May 27, 2016, Appellant moved the CCA to vacate its decision because of the participation of USCMCR Judge Martin T. Mitchell on the panel. On July 11, 2016, before the CCA ruled on this motion, Appellant filed a petition for grant of review at this Court. *United States v. Dalmazzi*, 75 M.J. 399 (C.A.A.F. 2016). As a result, the CCA dismissed the motion to vacate for lack of jurisdiction.

II. BACKGROUND

In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the

CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges by ... re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate

Military Judge of the United States Court of Military Commission Review."

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's court-martial. The CCA's opinion was issued on May 12, 2016, ten days after Colonel Mitchell took the oath of office as a USCMCR appellate judge but two weeks before the President signed his commission.

Appellant asserts that: (1) as a USCMCR judge, Colonel Mitchell was prohibited by 10 U.S.C. § 973(b)(2)(A)(ii) from sitting on the CCA; and (2) his service on both the USCMCR and the CCA violated the Appointments Clause of the Constitution.

III. Discussion

The Appointments Clause of the Constitution provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of

> such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. Thus, three separate actions are required for the President to appoint an "additional judge" to the USCMCR under the terms of 10 U.S.C. § 950f: (1) the President nominates a person for the position and sends his name to the Senate for confirmation; (2) the Senate confirms the nominee; and (3) the President appoints the confirmed nominee to the position. Normally, the President signs a commission as evidence of the appointment. But

> if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156 (1803). While not necessary for the appointment, the commission is "conclusive evidence of it." *Id.* at 157. Before the issuance of the commission, the President is free to change his mind and not make the appointment; afterwards, he is not. *See Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004).

Appellant argues that actions Colonel Mitchell took as a judge on the USCMCR before the President issued the commission were public acts that evidenced his appointment. We disagree. It is the President who must perform some public act that evinces the appointment, not the purported appointee. *See, e.g., Dysart*, 369 F.3d at 1306, 1312. Other than the commission, issued on May 25, 2016, there is no evidence that the President appointed Colonel Mitchell to the USCMCR. Therefore, that is the date of his presidential appointment as judge to the USCMCR.

As Colonel Mitchell had not yet been appointed a judge of the USCMCR at the time the judgment in Appellant's case was released, the case is moot as to these issues.

IV. DECISION

The order of August 18, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI
United States Air Force

ACM 38808

ORDER

Panel No. 3

On 12 May 2016, this Court issued an opinion affirming the findings and sentence in Appellant's case. *United States v. Dalmazzi*, ACM 32708 (A.F. Ct. Crim. App. 12 May 2016) (unpub. op.). Appellant filed a motion to vacate this opinion on 27 May 2016. The United States filed its motion in opposition on 22 June 2016.

Appellant has since filed a petition for grant of review of her case with the United States Court of Appeals for the Armed Forces. *United States v. Dalmazzi*, __ M.J. __, No. 16-0651/AF (Daily Journal 11 July 2016). Given the petition, this Court no longer possesses jurisdiction over Appellant's case. *See*

United States v. Riley, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003).

Accordingly, it is by the Court on this 18th day of July, 2016,

ORDERED:

That Appellant's Motion to Vacate is DISMISSED.

[SEAL] FOR THE COURT

LAQUITTA J. SMITH
APPELLATE PARALEGAL SPECIALIST

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI
United States Air Force

ACM 38808

12 May 2016

Sentence adjudged 21 January 2015 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dismissal and confinement for 1 month.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Lieutenant Colonel Roberto Ramirez and Gerald R. Bruce, Esquire.

Before
MITCHELL, DUBRISKE, and BROWN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

DUBRISKE, Judge:

Appellant, in accordance with her plea, was found guilty of wrongfully using ecstasy, a Schedule I controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A second charge and specification, alleging Appellant obstructed the investigation into her drug use by repeatedly dyeing her hair in an effort to avoid forensic detection, was dismissed after acceptance of her plea pursuant to a pretrial agreement.

Appellant was sentenced by a military judge sitting alone to a dismissal and one month of confinement. The general court-martial convening authority approved the sentence as adjudged.

On appeal, Appellant raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). First, Appellant alleges the military judge erred in not dismissing the charges against her due to unlawful command influence. Second, Appellant argues her sentence is inappropriately severe. Finding no error, we affirm the findings and sentence.

Background

In January 2014, the Air Force Office of Special Investigations (AFOSI) opened drug investigations against a small number of commissioned officers, including Appellant, who were stationed at six different Air Force installations. AFOSI investigators, during the course of analyzing cell phones seized during these investigations, also discovered some of these same officers had improperly disclosed proficiency testing materials for officers operating intercontinental ballistic missile systems.

The subsequent command-directed investigation of the test compromise allegations identified almost 100 potential suspects, including Appellant. The test compromise investigation drew significant media attention, and resulted in press conferences and statements from senior leaders within both the Department of Defense and the Department of the Air Force. These statements and press conferences were almost exclusively focused on the test compromise investigation and, eventually, the disciplinary results and corrective actions stemming from the investigation. While the original drug investigations were mentioned during some senior leader statements as the reason the test compromise allegations were discovered, only generic details about the actual investigations were ever released. One senior leader, when specifically asked about the drug allegations, declined to discuss any details as the criminal investigations were ongoing.

Disciplinary action on the test compromise allegations was eventually handled by the numbered air force commander with authority over the involved officers. There was insufficient evidence to support disciplinary action against Appellant for compromising proficiency testing materials.

Appellant was eventually charged with using ecstasy on "divers" occasions and impeding the AFOSI investigation against her. After charges against her were referred to general court-marital, the basic details regarding her trial proceedings were released to the public.

Unlawful Command Influence

On appeal, Appellant claims the military judge erred in denying her motion to dismiss all charges due to unlawful command influence. Appellant, adopting her arguments at trial, primarily alleges the disciplinary fallout from the much publicized test compromise investigation, which resulted in Appellant's chain of command being relieved of their leadership positions, pressured Appellant's current chain of command to bring criminal charges against her due to fear they would likewise lose their command positions if they failed to hold Appellant accountable.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in

reaching the findings or sentence in any case . . . ." The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94–95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)).

We review allegations of unlawful command influence de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). "On appeal, the accused bears the initial burden of raising unlawful command influence. Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." *Id.* (citing *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999)). The initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Appellant must initially present "some evidence" of unlawful command influence. *Id.* (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).

After an issue of unlawful command influence is raised by some evidence, the burden shifts to the Government to rebut an allegation by persuading the court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful com-

mand influence will not affect the findings or sentence. *Biagase*, 50 M.J. at 151. "Where, as here, the issue is litigated on the record at trial, the military judge's findings of fact are reviewed under a clearly erroneous standard, but the question of command influence flowing from those facts is a question of law that this court reviews de novo." *United States v. Jeter*, 74 M.J. 772, 778 (A.F. Ct. Crim App. 2015), *pet. rev. denied*, 75 M.J. 63 (C.A.A.F. 2015).

As an initial matter, we adopt the military judge's findings of fact as they are supported by the record. Upon our independent review of the question of law, we likewise find Appellant failed to meet her initial burden of showing the pretrial publicity and disciplinary response for the test compromise investigation constituted actual or apparent unlawful command influence as it related to the charges in her case. The record clearly establishes the senior leader and command involvement cited by Appellant was focused almost exclusively on matters unrelated to Appellant's case. As such, the argument her command's decision to move forward on drug charges was somehow influenced by a fear of being relieved of command is speculative at best. In so holding, we would note the decision to court-martial a commissioned officer accused of repeatedly using illegal narcotics, instead of imposing some form of administrative action, is not an anomaly within the military justice system.

Moreover, as noted by the military judge, Appellant's theory that her chain of command was unduly concerned about the consequences of disciplinary inaction was rebuffed by the fact that action was not taken against her for compromising testing materials. Commanders fearful they would meet the same fate as their predecessors should have driven them to hold Appellant accountable for all possible disciplinary violations. Appellant's speculative claim is therefore insufficient in our opinion to shift the burden of proof to the Government on this issue.

Assuming, arguendo, that Appellant produced some evidence that unlawful command influence had the potential to impact the trial proceedings, we find beyond a reasonable doubt that this judge alone case was not impacted by actual or apparent unlawful command influence. An objective, disinterested member of the public, fully informed of all facts and circumstances, would not harbor a significant doubt as to the fairness of Appellant's trial. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

Sentence Appropriateness

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct.

Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

After giving individualized consideration to this particular Appellant, her relatively brief record of service, the nature and seriousness of the offense, and all other matters contained in the record of trial, we decline to grant Appellant the relief she requests before this court. The approved sentence for Appellant's repeated use of an illegal drug is not unduly harsh or otherwise inappropriate in our opinion.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and the sentence are AFFIRMED.

[SEAL] FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

LIFTING STAY
AFFIRMING PRIOR ORDERS
DENYING DISQUALIFICATION AND RECUSAL MOTIONS
SETTING ORAL ARGUMENT

CMCR CASE NO. 14-001

May 18, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and

did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee' s mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri*, 791 F .3d 71 (D .C. Cir. 2015); Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presiden-

tial nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri,* 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016, 2 and they were sworn as USCMCR judges on May 2, 2016.[2]

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant's motion for leave to file an outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel,

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[1] *See* 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

[2] U.S. Cong., Nominations of 114th Cong., PN 1219, https://www.congress.gov/nomination/114th-congress/1219 (Judge Mitchell), and PN 1224, https://www.congress.gov/nomination/114thcongress/1224 (Judge King). (Encl. I, 2)

alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion, and we approved the extension request.

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis

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[3] The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the "Air Force nomination of Martin T. Mitchell, to be colonel"

for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra*.

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military

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and "Navy nomination to Donald C. King, to be Captain." It mirrors the closing phrase of PN 1219 and 1224.

judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions

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[4] Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non–military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is GRANTED.

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is GRANTED.

ORDERED that orders our Court previously decided are AFFIRMED.

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is DENIED.

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is DENIED.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

CMCR CASE NO. 14-001

May 2, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On June 26, 2015, appellant filed an unopposed motion moving "the Court to stay the proceedings while it explores options for re-nomination and reconfirmation of the military judges as U.S.C.M.C.R. judges." Appellant explained that the stay sought is for all litigation on the two government appeals filed with our Court. Appellee did not object to the suspension of proceedings.

By a series of orders, our Court ordered the continued suspension of the hearing schedule and oral argument. The President nominated, and on March 14, 2016, the Senate confirmed Judges Mitchell and King. On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders and decisions. On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion.

Therefore, it is hereby

ORDERED that the suspension of the briefing schedule and oral argument is continued in this case. Appellee's motion to delay responding to appellant's April 29, 2016 motion until May 16, 2016 is GRANTED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

Copy to:
Convening Authority, OMC
Judges Listed
Appellate Counsel

CHRONOLOGY

Oct. 28, 2014	Col. Martin T. Mitchell "assigned" to Court of Military Commission Review (CMCR) under § 950f(b)(2)
Jan. 21, 2015	Sentence adjudged by General Court-Martial in Petitioner's case
June 23, 2015	D.C. Circuit decides *Al-Nashiri*; encourages President and Senate to take steps to "put to rest any Appointments Clause questions regarding the CMCR's military judges." 791 F.3d at 86
Mar. 14, 2016	President Obama nominates Col. Mitchell to the position of "additional judge" on the CMCR under § 950(f)(b)(3)
Apr. 28, 2016	Senate confirms Judge Mitchell's appointment to CMCR as "additional judge" under § 950(f)(b)(3)
May 2, 2016	Judge Mitchell takes oath of office as CMCR judge and participates in procedural ruling in *Al-Nashiri*
May 12, 2016	Petitioner's conviction and sentence affirmed by three-judge AFCCA panel that includes Judge Mitchell
May 18, 2016	In decision joined by Judge Mitchell, CMCR rejects § 973(b) challenge to his CMCR appointment
May 25, 2016	President Obama signs Judge Mitchell's CMCR commission

May 27, 2016	Petitioner moves AFCCA for reconsideration on ground that Judge Mitchell's CMCR appointment terminated his military service (and thereby disqualified him from sitting on AFCCA)
July 11, 2016	Petitioner files petition for review at CAAF
July 18, 2016	AFCCA dismisses Petitioner's motion for reconsideration for lack of jurisdiction

RECORD AND BRIEFS

Nos. 16-961 and 16-1017

In the Supreme Court of the United States

NICOLE A. DALMAZZI, PETITIONER

v.

UNITED STATES OF AMERICA

LAITH G. COX, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Armed Forces erred in denying discretionary review of petitioners' challenges to the continued service of military judges on service courts of criminal appeals after those judges were appointed by the President to the United States Court of Military Commission Review (USCMCR).

2. Whether 10 U.S.C. 973(b), which provides that, except as otherwise authorized by law, a military officer may not hold a "civil office" that requires a presidential appointment with Senate confirmation, prohibits a military officer from serving simultaneously as a presidentially appointed judge on the USCMCR and an appellate military judge on a service court of criminal appeals.

3. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, bars a military officer from serving simultaneously as a presidentially appointed judge on the USCMCR and an appellate military judge on a service court of criminal appeals.

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In the Supreme Court of the United States

No. 16-961

NICOLE A. DALMAZZI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 16-1017

LAITH G. COX, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

In No. 16-961 (*Dalmazzi*), the opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-7a) is reported at 76 M.J. 1. In No. 16-1017 (*Cox*), the orders of the United States Court of Appeals for the Armed Forces (*Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a) are unreported.[1]

[1] Unless otherwise noted, references to "Pet. App." refer to the appendix to the petition for a writ of certiorari in *Dalmazzi*.

JURISDICTION

In *Dalmazzi*, the judgment of the United States Court of Appeals for the Armed Forces was entered on December 15, 2016. The petition for a writ of certiorari was filed on February 1, 2017. In *Cox*, the judgments of the United States Court of Appeals for the Armed Forces were entered on December 27, 2016, and January 17, 2017. The petition for a writ of certiorari was filed on February 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3). As explained below, however, this Court lacks jurisdiction because it may not review "any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." 10 U.S.C. 867a(a); see pp. 10-11, *infra*.

STATEMENT

Petitioner Dalmazzi was convicted of using ecstasy and sentenced to one month of confinement and dismissal from the armed forces. The United States Air Force Court of Criminal Appeals (AFCCA) affirmed. Pet. App. 10a-17a.

Petitioner Cox was convicted of several offenses arising from sexual misconduct with a child and sentenced to 40 years of confinement and dismissal from the armed forces. The United States Army Court of Criminal Appeals (ACCA) affirmed in part and affirmed the sentence. *Cox* Pet. App. 1a-10a.

Petitioner Craig was convicted of attempted indecent visual recording and sentenced to a reduction in grade, 20 days of confinement, and a bad-conduct discharge. *Cox* Pet. 5-6. The ACCA affirmed. *Cox* Pet. App. 12a-13a.

Petitioner Lewis was convicted of several offenses arising from two sexual-misconduct incidents and was

sentenced to six years of confinement, a reduction in grade, and forfeiture of all pay and allowances. The AFCCA modified the findings of guilt but affirmed the sentence. *Cox* Pet. App. 16a-45a.

Petitioner Miller was convicted of two specifications of child sexual assault and sentenced to 20 months of confinement, a reduction in grade, and a bad-conduct discharge. *Cox* Pet. 7. The ACCA affirmed. *Cox* Pet. 52a-53a.

Petitioner Morchinek was convicted of misbehavior before the enemy and a drug offense and was sentenced to two months of confinement, a reduction in grade, forfeiture of pay, a bad-conduct discharge, and a reprimand. The AFCCA affirmed. *Cox* Pet. App. 55a-66a.

Petitioner O'Shaughnessy was convicted of sexual assault and abusive sexual contact and was sentenced to 60 days of confinement, a reduction in grade, forfeiture of all pay and allowances, and a bad-conduct discharge. The AFCCA affirmed. *Cox* Pet. App. 68a-77a.

The United States Court of Appeals for the Armed Forces (CAAF) granted a petition for discretionary review in each case, but later vacated its orders granting review and denied the petitions. Pet. App. 1a-7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

1. Petitioners are seven military servicemembers who were convicted before military courts-martial and whose convictions were affirmed by the ACCA or the AFCCA. Petitioners contend that they are entitled to new hearings before the ACCA or the AFCCA because the panels that acted on their appeals included one or more military judges who were later appointed to the United States Court of Military Commission Review (USCMCR) by the President with the advice and consent of the Senate.

a. Congress established the USCMCR in the Military Commissions Act of 2009 (MCA), Pub. L. No. 109-84, Div. A, Tit. XVIII, 123 Stat. 2574. The USCMCR is an intermediate appellate tribunal for military commissions, performing a function analogous to the one served for courts-martial by the ACCA, the AFCCA, and the other service courts of criminal appeals. See 10 U.S.C. 950f(a). The USCMCR's decisions are reviewed by the D.C. Circuit. See *In re al-Nashiri*, 791 F.3d 71, 74-75 (D.C. Cir. 2015).

The MCA authorizes both military officers and civilians to serve as judges on the USCMCR. 10 U.S.C. 950f(b). The Secretary of Defense may "assign persons who are appellate military judges to be judges on the [USCMCR]." 10 U.S.C. 950f(b)(2). A person so assigned must be a commissioned officer in the armed forces. *Ibid.* In addition, the President may "appoint, by and with the advice and consent of the Senate, additional judges," who are not required to be military officers. 10 U.S.C. 950f(b)(3); see *Nashiri*, 791 F.3d at 74-75.

The USCMCR's jurisdiction is limited to reviewing military commission proceedings. Because of that specialized docket, there are times when "the Court's judges may have very little to do." *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). "Consistent with that reality, the military judges who serve on the [USCMCR] also continue to serve on the military appeals courts from which they are drawn." *Ibid.*

b. In November 2014, a military commission defendant, Abd Al-Rahim Husein Muhammed al-Nashiri, petitioned the D.C. Circuit for a writ of mandamus seeking disqualification of the military USCMCR judges hearing an interlocutory appeal in his case. Among other things, Nashiri argued that appellate

military judges assigned to the USCMCR are principal officers under the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, who must be appointed by the President and confirmed by the Senate to their positions on that court. *Nashiri*, 791 F.3d at 73, 75.

The D.C. Circuit denied the petition, holding that Nashiri had not established the "clear and indisputable" right required for mandamus relief. *Nashiri*, 791 F.3d at 85-86. The D.C. Circuit did not decide whether USCMCR judges are, in fact, principal officers. *Ibid.* It also did not decide whether, if they are, the Appointments Clause requires judges previously appointed as commissioned military officers by the President with the advice and consent of the Senate to be appointed a second time specifically to the USCMCR. *Ibid.* But the D.C. Circuit observed that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges" by nominating and confirming them under 10 U.S.C. 950f(b)(3). *Nashiri*, 791 F.3d at 86.

c. "The President chose to take that tack" as a prophylactic measure, without conceding that it was constitutionally required. *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). In April 2016, the Senate confirmed the two military judges on Nashiri's panel to the USCMCR. *Ibid.*

A few weeks later, Nashiri moved in the USCMCR to disqualify the military judges on his panel based on 10 U.S.C. 973(b)(2), which provides that, unless "otherwise authorized by law," a military officer may not hold a "civil office" that "requires an appointment by the President by and with the advice and consent of

the Senate." Nashiri argued that Section 973(b)(2) barred military officers from being appointed as USCMCR judges. Pet. App. 21a-22a. The USCMCR denied the motion, holding that military officers' service on the USCMCR is "authorized by law" because the MCA specifically authorizes military officers to be judges on that court. *Id.* at 22a. The USCMCR also held that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[d]isposition of violations of the law of war by military commissions is a classic military function." *Id.* at 23a-24a.

Nashiri sought a writ of mandamus from the D.C. Circuit based on his claim that Section 973(b)(2) bars military officers from being appointed to the USCMCR. The D.C. Circuit denied the petition in a per curiam order. *In re al-Nashiri*, No. 16-1152 Docket entry No. 1615339 (May 27, 2016).

2. Petitioners were convicted of a variety of offenses before military courts-martial. See pp. 2-3, *supra*. Petitioners appealed to the ACCA or the AFCCA, as relevant. The ACCA and the AFCCA affirmed petitioners' convictions and sentences, in some cases with modifications. Pet. App. 8a-17a; *Cox* Pet. App. 1a-10a; 12a-13a, 52a-53a, 55a-66a, 68a-77a.

In six of the seven cases, petitioners' appeals were assigned to panels that included one or more appellate military judges who were also serving on the USCMCR by virtue of an assignment by the Secretary of Defense, and who were later appointed to the USCMCR by the President. The ACCA and AFCCA issued their judgments in petitioners' cases before the

judges were appointed by the President. Pet. App. 4a-5a, 7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.[2]

3. Petitioners sought discretionary review in the CAAF. The CAAF granted their petitions limited to two issues: (1) whether 10 U.S.C. 973(b) bars an appellate military judge from serving simultaneously on a service court of criminal appeals and as a presidentially appointed USCMCR judge, and (2) whether such simultaneous service violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. App. 5a; see *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

In *Dalmazzi*, the CAAF concluded that, because the relevant judge on Dalmazzi's AFCCA panel "had not yet been appointed a judge of the USCMCR at the time the judgment in [Dalmazzi's] case was released, the case [wa]s moot as to th[e] issues" on which the CAAF had granted review. Pet. App. 7a. The CAAF therefore vacated its order granting review and denied Dalmazzi's petition. *Ibid.*

In each of the other cases, the CAAF issued brief orders noting that, as in *Dalmazzi*, the relevant judges on petitioners' ACCA and AFCCA panels had not been appointed to the USCMCR until after the courts

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[2] The seventh appeal, filed by petitioner Lewis, was decided by an AFCCA panel that did not include a judge serving on the USCMCR. *Cox* Pet. App. 15a-45a. Lewis's motion for reconsideration was assigned to a special panel that included a judge serving on the USCMCR. *Id.* at 46a-47a. The special panel denied the motion for reconsideration on May 17, 2016, eight days before the relevant judge was appointed by the President to the USCMCR. *Id.* at 48a-50a; see *id.* at 51a. On May 30, 2016, Lewis moved the special panel to reconsider its ruling, arguing that the judge's appointment to the USCMCR had disqualified him from serving on that panel. *Cox* Pet. 6. It appears that the special panel did not rule on that motion. *Ibid.*

issued their judgments in petitioners' cases. Accordingly, "in light of [its decision in] *Dalmazzi*," the CAAF vacated its orders granting review and denied the petitions for review in those cases as well. *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

4. After denying the petitions in these cases, the CAAF rejected the statutory and constitutional challenges that petitioners had sought to raise in a different case in which the AFCCA's judgment "was issued after the President appointed [a judge on the AFCCA panel] to the USCMCR." *United States* v. *Ortiz*, No. 16-671, 2017 WL 1382241, at *2 (Apr. 17, 2017).

The CAAF first held that the defendant in *Ortiz* was not entitled to relief under 10 U.S.C. 973(b). 2017 WL 1382241, at *2-*3. The court concluded that even if the judge's position on the USCMCR were a "civil office," and even if his appointment to that office were not "otherwise authorized by law," any violation of Section 973(b) would not affect the judge's service on the AFCCA. *Id.* at *2; see *id.* at *2-*3. The court observed that although Section 973(b) prohibits military officers from holding certain civil offices, it "neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination." *Id.* at *3. Thus, even if Section 973(b) "prohibit[ed] [the relevant judge] from holding office at the USCMCR" it would not "prohibit[] [him] from carrying out his assigned military duties at the [AF]CCA." *Ibid.* The CAAF also noted that the defendant's challenge was foreclosed by Section 973(b)'s savings clause, which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official

duties." 10 U.S.C. 973(b)(5); see *Ortiz*, 2017 WL 1382241, at *3.

The CAAF next held that the relevant judge's simultaneous service on the AFCCA and the USCMCR did not violate the Appointments Clause. *Ortiz*, 2017 WL 1382241, at *3-*5. The court assumed without deciding that the judges of the USCMCR are principal officers. *Id.* at *5. But the court rejected the defendant's argument that it would violate the Appointments Clause for a person who serves as a principal officer on the USCMCR to serve on the AFCCA, where he is subject to supervision by other officers. *Ibid.*; cf. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997) (holding that judges on a service court of criminal appeals "are 'inferior Officers' within the meaning of the [Appointments Clause]"). The court explained that the defendant's argument erroneously "presum[ed] that [the officer's] status as a principal officer on the USCMCR somehow carries over to the [AF]CCA, and invests him with authority or status not held by ordinary [AF]CCA judges." *Ortiz*, 2017 WL 1382241, at *4. In fact, the court concluded, "[t]hat is not the case." *Ibid.* The court explained that even if an officer appointed to the USCMCR is a principal officer when acting in his capacity as a judge on that court, "[w]hen [the officer] sits as a [AF]CCA judge, he is no different from any other [AF]CCA judge." *Ibid.* The court thus saw "no Appointments Clause problem" with simultaneous service. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 10-18) that the CAAF erred in denying review of their statutory and constitutional claims and that this Court should decide those

claims in the first instance.[3] But this Court lacks jurisdiction over these cases because it does not have statutory authority to review the CAAF's denial of discretionary review. In any event, the issues petitioners seek to raise would not warrant review even if the Court had jurisdiction. The CAAF permissibly chose not to consider petitioners' claims because it determined that the timing of their appeals meant that those claims were not properly presented. That fact-bound, discretionary determination lacks continuing importance. And although petitioners also ask this Court to decide their underlying statutory and constitutional claims, these cases would not be appropriate vehicles in which to do so because those claims were not passed upon below. Petitioners' underlying claims also lack merit, as the CAAF held in *United States* v. *Ortiz*, No. 16-671, 2017 WL 1382241 (Apr. 17, 2017). The petitions for writs of certiorari should be denied.

1. This Court lacks jurisdiction. Decisions of the CAAF "are subject to review by [this] Court by writ of certiorari as provided in [28 U.S.C.] 1259." 10 U.S.C. 867a(a). Petitioners invoke (Pet. 1) Section 1259(3), which grants this Court jurisdiction to review "[c]ases in which the [CAAF] granted a petition for review under [10 U.S.C.] 867(a)(3)," a discretionary review provision. But Section 1259(3) does not apply here because the CAAF "vacate[d]" its orders granting review and then "denied" the petitions for review. Pet. App. 7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a. "Supreme Court review is available if, but only if, the

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[3] The *Cox* petitioners adopt (Pet. 8-10) the arguments in the petition for a writ of certiorari in *Dalmazzi* and state (Pet. 2) that their claims "rise and fall with *Dalmazzi*." Unless otherwise noted, references to "Pet." refer to the petition in *Dalmazzi*.

CAAF decides a case on its merits * * * . [I]f the [CAAF] does not grant a petition for review, and thus does not decide a case on its merits, the Supreme Court has no jurisdiction to review that inaction by way of certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* 129 (10th ed. 2013).

Petitioners assert (Pet. 1 & n.1) that this Court has jurisdiction because the CAAF initially "granted * * * petition[s] for review under [S]ection 867(a)(3)," 28 U.S.C. 1259(3), even though it later vacated its orders granting review and denied the petitions without addressing petitioners' claims on the merits. But petitioners cite no authority supporting their assertion that Section 1259(3) confers jurisdiction in these circumstances, and their argument is inconsistent with 10 U.S.C. 867a(a). That provision expressly limits the Court's jurisdiction under Section 1259 by specifying that the Court "may not review by a writ of certiorari under this section any action of the [CAAF] in refusing to grant a petition for review." *Ibid.* That limitation applies here because the CAAF decisions that petitioners ask this Court to review are orders that "denied," *i.e.*, refused to grant, their petitions for review. Pet. App. 7a; *Cox* Pet. App. 11a, 14a, 51a, 54a, 67a, 78a.

2. Even if this Court had jurisdiction, the CAAF's discretionary decisions denying review would not warrant certiorari.

a. Petitioners contend (Pet. 10-12) that the CAAF erred in describing its denial of review in *Dalmazzi* as a matter of "mootness." As the context makes clear, however, the CAAF's statement that the case was "moot as to th[e] issues" on which it had granted review did not reflect a statement that the case was moot

in the Article III sense, but rather reflected the CAAF's conclusion that the case did not present the relevant issues in a concrete context. Pet. App. 7a; see *Black's Law Dictionary* 1161 (10th ed. 2014) ("moot, adj. * * * 2. Having no practical significance; hypothetical or academic"). The CAAF explained that Dalmazzi sought to challenge an officer's simultaneous services as a judge on the AFCCA and an appointed judge on the USCMCR, but that the relevant officer "had not yet been appointed a judge of the USCMCR at the time the judgment in [Dalmazzi's] case was released." Pet. App. 7a.

The CAAF's use of colloquial language does not warrant this Court's review, particularly because the CAAF's basic point was correct. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). There is no reason for this Court to consider whether the CAAF made any terminological error in explaining its well-founded discretionary decision to deny review.

b. Petitioners also argue (Pet. 10-11) that the CAAF erred in concluding that the questions they sought to raise were not properly presented. They are mistaken.

Petitioners principally contend (Pet. 11; *Cox* Pet. 9-10) that the judges on their panels violated 10 U.S.C. 973(b)(2)'s prohibition on serving in certain "civil office[s]" even before the President appointed them to the USCMCR because the judges "exercise[d] the functions" of a USCMCR judge before that date. 10 U.S.C. 973(b)(2). It is true that the relevant judges served on the USCMCR even before their presidential appointments because they had previously been assigned to the USCMCR by the Secretary of Defense.

But petitioners' challenges to the validity of the judges' service on the ACCA and the AFCCA were explicitly based on the judges' *appointment* to the USCMCR by the President, not their previous *assignment* to that court by the Secretary.[4] The CAAF thus did not err in concluding that petitioners' statutory challenges would have been properly presented only if the judges had acted on their cases after being appointed by the President.

Dalmazzi also advances the case-specific argument (Pet. 10-11) that even though the AFCCA issued its judgment in her case before the relevant judge was appointed to the USCMCR, her motion for reconsideration was still pending at the time of the appointment. But, as the CAAF explained, the AFCCA lost jurisdiction over Dalmazzi's case before acting on that motion when Dalmazzi filed a petition for review in the CAAF. Pet. App. 3a. The CAAF thus did not err in focusing on the date of the AFCCA's judgment rather than the pendency of the motion for reconsideration.

c. For the foregoing reasons, the CAAF permissibly declined to grant discretionary review based on its determination that petitioners' claims were not properly presented here. But even if that were incorrect (and even if this Court had jurisdiction), any error would not warrant this Court's review because the issue lacks continuing importance. The CAAF's determination that petitioners' claims were not properly presented rested on the fact that the ACCA and the

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[4] See, *e.g.*, *Dalmazzi* Pet. C.A. Br. 11 ("[T]he decision of the President, with the advice and consent of the Senate, to *appoint* Judge Mitchell to the USCMCR, where he had previously been merely assigned, created statutory and constitutional impediments to his continued service on the [AFCCA].").

AFCCA decided petitioners' appeals before the relevant judges were appointed to the USCMCR by the President. Although petitioners assert (Pet. 12-13) that a number of other cases are in the same posture, the CAAF's conclusion that cases in that posture do not present the statutory and constitutional claims that petitioners seek to raise will not be relevant going forward because the military judges sitting on the USCMCR have now been appointed by the President with the advice and consent of the Senate. As *Ortiz* illustrates, that means that cases decided by the service courts of criminal appeals in the future will not present the threshold obstacle that prevented the CAAF from reaching the merits here. See 2017 WL 1382241, at *2 (deciding the underlying statutory and constitutional questions because the AFCCA's decision in that case "was issued after the President appointed [a judge on the AFCCA panel] to the USCMCR").

3. Petitioners contend (Pet. 13-18) that, in addition to reviewing the CAAF's reason for denying discretionary review, this Court should also decide their underlying statutory and constitutional challenges in the first instance. But those questions were not addressed below, and these cases thus would not be appropriate vehicles in which to consider them even if the Court had jurisdiction. This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it ordinarily does not address issues that were not passed upon by the courts below. Petitioners identify no sound reason to depart from that rule here. And petitioners' statutory and constitutional claims would not warrant this Court's review even if they were properly presented: The CAAF correctly rejected those claims in *Ortiz*, and

that decision does not conflict with any decision of this Court or another court of appeals.

a. Petitioners' statutory argument is based on 10 U.S.C. 973(b), which provides that, "[e]xcept as otherwise authorized by law," military officers may not "hold, or exercise the functions of, a civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). Petitioners assert (Pet. 4-8) that Section 973(b) bars a military officer from serving on a service court of criminal appeals after being appointed to the USCMCR by the President. That contention fails for four independent reasons: (i) military officers are "authorized by law" to serve as judges on the USCMCR; (ii) the position of USCMCR judge is not a "civil office" under Section 973(b); (iii) an appointment by the President, with the advice and consent of the Senate, is not "require[d]" for a military officer to serve on the USCMCR; and (iv) petitioners would not be entitled to relief even if they were correct that simultaneous service on a service court of criminal appeals and the USCMCR violates Section 973(b) because the statute expressly provides that it shall not "be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties," 10 U.S.C. 973(b)(5).

i. Section 973(b)(2) does not prohibit a military officer from holding a covered civil office if the officer is "authorized by law" to do so. 10 U.S.C. 973(b)(2)(A). Here, the MCA expressly authorizes the Secretary of Defense to assign "appellate military judges" to the USCMCR and requires that "[a]ny judge so assigned shall be a commissioned officer of the armed forces." 10 U.S.C. 950f(b)(2); see *In re Khadr*, 823 F.3d 92, 96

(D.C. Cir. 2016) ("The [MCA] authorizes both military judges and civilians to serve on the [USCMCR]."). By providing that one of the two mechanisms for USCMCR judges to be selected applies only to military officers, Congress made clear that military officers are "authorized by law" to serve on that court. Consistent with that statutory authorization, the overwhelming majority of the USCMCR's judges have been military officers. *Khadr*, 823 F.3d at 96.

Petitioners contend (Pet. 6-7) that the MCA is insufficiently "clear and unambiguous" to provide the necessary "authoriz[ation] by law." But nothing in Section 973(b)(2) imposes or suggests the clear-statement rule petitioners advocate. And even if such clarity were necessary, it would be supplied by the MCA's express requirement that all judges assigned to the USCMCR under Section 950f(b)(2) *must* be military officers, as well as by other provisions of the MCA that plainly contemplate that USCMCR judges may be military officers.[5]

ii. The position of USCMCR judge is not a "civil office" within the meaning of Section 973(b)(2). As the USCMCR has explained, adjudication of violations of the law of war by military commissions is "a classic military function." Pet. App. 24a; see William Winthrop, *Military Law and Precedents* 835 (2d ed. 1920) (noting that "military commissions * * * have invariably been composed of commissioned officers of the

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[5] See, *e.g.*, 10 U.S.C. 949b(b)(4) (providing that the Secretary of Defense may reassign appellate military judges on the USCMCR to other duties "in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member" if the reassignment is "based on military necessity and * * * is consistent with service rotation regulations").

army"). Service by military officers on the USCMCR is thus consistent with the well-recognized role of military officers in administering the law of war and in no way threatens the "civilian preeminence in government" that Section 973(b)(2) is designed to protect. *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); see *id.* at 884-885 (holding that the office of notary public is not a "civil office" because military judge advocates have traditionally served as notaries within the military and because service in that office does not undermine the purposes of Section 973(b)).

Petitioner contends (Pet. 5-6) that any office that may be held by a civilian is a "civil office." But that expansive reading is inconsistent with precedent. See, *e.g.*, *Riddle*, 522 F.2d at 884-885. And it would mean that quintessential military offices, such as appellate military judgeships on the service courts of criminal appeals, are "civil office[s]" merely because civilians may also hold them. See 10 U.S.C. 866(a) (providing that appellate military judges on service courts of appeals may be commissioned officers or civilians).

iii. An additional reason that the prohibition in Section 973(b)(2) does not bar military officers from serving as USCMCR judges is that the office of USCMCR judge does not "require[] an appointment by the President by and with the advice and consent of the Senate." Although the President responded to the D.C. Circuit's decision in *Nashiri* by appointing military officers to the USCMCR with the advice and consent of the Senate, no court has held that such an appointment is required. See *Nashiri*, 791 F.3d at 82-86 (declining to resolve that "question[] of first impression"). Petitioners suggest (Pet. 5) that the government has conceded this issue, but in fact the gov-

ernment has maintained that military officers do not require an appointment to serve as USCMCR judges because USCMCR judges are not principal officers. See *Nashiri*, 791 F.3d at 83 (noting the government's argument that the USCMCR judges are inferior officers because the Secretary of Defense supervises the court and can remove its military judges).

iv. Finally, even if petitioners were correct that Section 973(b) prohibits an officer from serving simultaneously on a service court of criminal appeals and on the USCMCR, petitioners would not be entitled to relief for the reasons identified by the CAAF in *Ortiz*. By its terms, Section 973(b) prohibits military officers from serving in specified civil offices, but "[n]othing in the text suggests that it prohibits" an officer who assumes a prohibited civil office "from carrying out his assigned military duties." *Ortiz*, 2017 WL 1382241, at *3. And Section 973(b)'s savings clause expressly forecloses petitioners' attempt to use that provision to overturn the ACCA and AFCCA decisions in their cases because it provides that "nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5); see *Ortiz*, 2017 WL 1382241, at *3. The relevant judges on the ACCA and AFCCA decided petitioners' appeals "in furtherance of [their] assigned official duties," and petitioners thus cannot invoke Section 973(b) to challenge the courts' decisions.

b. Petitioners' Appointments Clause claim (Pet. 14-18) also lacks merit. The Appointments Clause provides that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States," but that

"Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The military judges at issue here hold two distinct offices: They are judges on service courts of criminal appeals and they separately serve as judges on the USCMCR. Petitioners do not dispute that the officers were placed in each of those two separate offices in a manner consistent with the Appointments Clause.

Judges on the service courts of criminal appeals "are 'inferior Officers' within the meaning of [the Appointments Clause] by reason of the supervision over their work" by judge advocates general and by the CAAF. *Edmond* v. *United States*, 520 U.S. 651, 666 (1997). This Court has held that, because military judges are "already commissioned officers" and therefore have "already been appointed by the President with the advice and consent of the Senate," the Appointments Clause allows them to be assigned to the service courts of criminal appeals without a "second appointment." *Weiss* v. *United States*, 510 U.S. 163, 170 (1994); see *id.* at 176. Petitioners thus do not and could not contend that the assignment of the judges at issue here to the ACCA and the AFCCA violated the Appointments Clause.

Petitioners assert (Pet. 4, 14-18) that judges on the USCMCR are principal officers. The government disagrees with that premise. See pp. 17-18, *supra*. But in any event, the military judges sitting on the USCMCR have now been appointed to that office in the manner required by the Appointments Clause for principal officers: by the President with the advice and consent of the Senate. See *In re al-Nashiri*, 835

F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). Those appointments "put to rest any Appointments Clause questions regarding the [US]CMCR's military judges," *Nashiri*, 791 F.3d at 86, and petitioners do not appear to contend that there is any Appointments Clause problem with the manner in which the relevant judges were appointed to the USCMCR.[6]

Petitioners' contention is, instead, that it violates the Appointments Clause for a single individual to serve simultaneously as a judge on a service court of criminal appeals (an inferior officer) and as a judge on the USCMCR (according to petitioners, a principal officer). But petitioners cite no authority holding that a single individual may not simultaneously serve as a principal officer and an inferior officer in two separate offices. And, as the CAAF explained in *Ortiz*, petitioners' Appointments Clause arguments erroneously "presume[] that [an officer's] status as a principal officer on the USCMCR somehow carries over to the [court of criminal appeals], and invests him with authority or status not held by ordinary [court of criminal appeals] judges." 2017 WL 1382241, at *4. "That is not the case." *Ibid.* Even if a USCMCR judge were a principal officer when he acted in his capacity as such, "[w]hen [the same individual] sits as an [AF]CCA

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[6] Petitioners do assert (Pet. 14-15) that the appointment of military officers to the USCMCR raises constitutional questions under the Commander-in-Chief Clause, U.S. Const. Art. II, § 2, Cl. 1. But petitioners acknowledge (Pet. 15 n.8) that "[t]he Questions Presented do not include the Commander-in-Chief claim" because they "ha[ve] no standing" to raise that claim. And in any event, petitioners' Commander-in-Chief Clause argument lacks merit. Cf. *Nashiri*, 791 F.3d at 75, 82 (denying a petition for mandamus raising a similar Commander-in-Chief Clause claim).

judge, he is no different from any other [AF]CCA judge." *Ibid.* The officer's status as a USCMCR judge grants him no additional authority on the AFCCA. *Ibid.* Conversely, the officer's status as an AFCCA judge subjects him to no greater supervision when he acts on the USCMCR. *Ibid.*

Relying on *Nguyen* v. *United States*, 539 U.S. 69 (2003), petitioners contend (Pet. 14) that the Appointments Clause prohibits the service courts of criminal appeals from sitting in "mixed" panels in which some of the judges are principal officers by virtue of their simultaneous appointment to the USCMCR. But that argument rests on petitioners' mistaken premise that a judge's status on the USCMCR somehow carries over to his actions in his separate capacity as a judge on a service court of criminal appeals. And *Nguyen* would not assist petitioners in any event because this Court's decision rested not on the Appointments Clause, but rather on a statute requiring that judges sitting by designation on the courts of appeals be Article III judges. 539 U.S. at 74-77 (citing 28 U.S.C. 292(a)).

Relying on *Myers* v. *United States*, 272 U.S. 52 (1926), petitioners further contend (Pet. 14) that the Appointments Clause prohibits a person serving as a principal officer on the USCMCR from simultaneously serving on a service court of criminal appeals because judges on those courts are subject to the "direct supervisory authority" of officers other than the President. But that argument again rests on the mistaken premise that a person who is a principal officer on the USCMCR is also a principal officer when acting in a different capacity on a service court of criminal appeals. And in any event, petitioners cite no authority to support their assertion that a principal officer may

not perform duties subject to the supervision of other officers. In the portion of *Myers* on which petitioners rely, the Court explained that Congress may not interfere with the President's power to remove principal officers; it did not hold that principal officers may not be subject to the "direct supervisory authority" of officials other than the President when they are serving in another capacity. 272 U.S. at 126-128; cf. *Freytag* v. *Commissioner*, 501 U.S. 868, 882 (1991) (noting that the inferior officers at issue in that case "on occasion perform[ed] duties that may be performed by an employee not subject to the Appointments Clause").

4. The appellant in *Ortiz* has sought and obtained an extension of time within which to file a petition for a writ of certiorari to and including June 9, 2017. See *Ortiz* v. *United States*, No. 16A1034 (filed Apr. 21, 2017). The forthcoming petition will presumably raise the same underlying statutory and constitutional claims that petitioners seek to raise here, but without the threshold jurisdictional obstacle identified above and in a case in which the CAAF passed upon the relevant claims. In the government's view, those claims do not warrant this Court's review even in a case in which they are properly presented. But in any event, there is no need to delay the Court's consideration of these petitions until the petition in *Ortiz* is fully briefed. The Court lacks jurisdiction in these cases. And even setting aside that jurisdictional obstacle, the CAAF's decision to deny review on threshold grounds means that petitioners would not be entitled to relief even if this Court granted review in *Ortiz* and adopted their position on the underlying statutory and constitutional issues.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,
Petitioner,

v.

UNITED STATES,
Respondent.

LAITH G. COX, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITIONERS' REPLY BRIEF

The government would have the Court believe, first, that these are fact-bound cases, and second, that the Civil War-era dual-officeholding ban codified at 10 U.S.C. § 973(b) is little more than a quaint legal artifact, rather than an important manifestation of civilian control over the military—itself a transcendent constitutional principle. *See, e.g.*, *Greer* v. *Spock*, 424 U.S. 828, 839 (1976). It further seeks to minimize petitioners' dual-officeholding challenge by portraying these cases as an inappropriate vehicle either because the Court lacks jurisdiction or because petitioners are not entitled to bring their claims based upon the timing of their appeals.

The government is mistaken on every count, and on most, it is in the awkward position of arguing against itself. The Questions Presented are of exceptional (and growing) importance to ongoing appeals in both the court-martial and military commissions systems; the Court of Appeals for the Armed Forces (CAAF) and the Court of Military Commission Review (CMCR) have reached incomplete and buck-passing conclusions as to how they should be answered; and further percolation is unlikely to alter the status quo. The Court can and should settle the matter now.

I. This Court Has Jurisdiction

The Court has jurisdiction because CAAF granted a petition for review in each petitioner's case. *See* Pet. 1 & n.1 (quoting 28 U.S.C. § 1259(3)); *Cox* Pet. 2 & n.1 (same).[1] The government argues that § 1259(3) "does

1. Except where otherwise indicated, citations to the "Pet." and "Pet. App." are to the filings in *Dalmazzi* (No. 16-961).

not apply here because the CAAF 'vacate[d]' its orders granting review and then 'denied' the petitions for review," Opp. 10, but this argument focuses on what CAAF *said*, rather than what it *did*. Section 1259's legislative history confirms that it is the latter that counts,[2] and here, CAAF granted petitions for review and then issue a published opinion purporting to resolve the matter. *See* Pet. App. 1a.

On the government's reading of § 1259(3), CAAF could insulate many—if not most—of its decisions from this Court's jurisdiction by vacating a grant of review at the end of any opinion, no matter how substantive. But the government itself has previously argued against the same construction of the very next clause of § 1259. *See* Reply Brief for the Petitioner at 5 n.1, *United States* v. *Denedo*, 555 U.S. 1041 (2008) (mem.), 2008 WL 4887709 (criticizing a reading of § 1259(4) that "would provide a means for the CAAF to insulate its own decisions from further review"). This Court agreed, holding that such "parsimonious" constructions of § 1259 are disfavored. *See United States* v. *Denedo*, 556 U.S. 904, 909 (2009).

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2. As the Senate Armed Services Committee explained, § 1259 separates the types of cases for which CAAF could be reviewed because "the Department of Justice recommended that direct Supreme Court review of military justice cases be limited to those *actually considered* by the Court of Military Appeals." S. REP. NO. 98-53, at 33 (1983) (emphasis added); *see also The Military Justice Act of 1982, Hearings Before the Subcomm. On Manpower & Personnel of the S. Comm. on Armed Services*, 97th Cong. 2d Sess. 21 (1982) (testimony of Hon. Robert H. Taft, IV, General Counsel, Dep't of Defense) ("[§ 1259] would authorize a petition for certiorari only in cases that actually go to the Court of Military Appeals and that are considered.").

The reading of § 1259(3) that the government would have the Court adopt reflects precisely the kind of parsimony *Denedo* condemned. Once CAAF grants a petition for review and "actually considers" a case (as it did here), this Court has jurisdiction under § 1259(3). CAAF cannot make a litigant's right to review its opinion in their case simply "go away" by vacating a grant of review at the end.[3]

II. Petitioners' Claims are Timely

The government also defends CAAF's "mootness" analysis in *Dalmazzi*. *See* Opp. 12. But CAAF's holding that Judge Mitchell (and, by implication, Judges Burton, Celtnieks, and Herring) did not serve in a "civil office" until President Obama signed their commissions is belied by both the text of § 973(b) and the Justice Department's own interpretations of that provision.

Section 973(b) is triggered when an active-duty military officer "holds" *or* "exercises the functions of" a civil office. *See* Pet. 11–12; *Cox* Pet. 10. Thus, the Justice Department has long agreed that "any objection" to occupation of such an office "could not depend upon the formality of appointment." Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 5 n.9 (May 17, 1983) [hereinafter "1983 OLC Memo"] (citing 14 OP. ATT'Y GEN. 200 (1873)).[4] Instead, the question is a

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3. Any lingering uncertainty over the Court's jurisdiction can be subsumed within the grant of certiorari and set for plenary briefing and argument. *See, e.g.*, *Montgomery* v. *Louisiana*, 135 S. Ct. 1546, 1546 (2015) (mem.).

4. The 1983 OLC Memo is available at https://perma.cc/YLM8-KTR6.

functional one, and there is no question that all four judges were "exercising the functions" of a CMCR judgeship at the time they decided Petitioners' appeals. *See* Pet. 11–12; *Cox* Pet. 10.

All but admitting that CAAF misread § 973(b) on this point, the government nevertheless suggests that "any error would not warrant this Court's review because the issue lacks continuing importance." Opp. 13. It is certainly true that the *timing* issue is narrow, but that can hardly be said for the merits. And "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995).

Because the government's threshold arguments against reaching the merits are unavailing, its suggestion that "these cases would not be appropriate vehicles in which to consider them even if the Court had jurisdiction," Opp. 14, falls flat. It would be one thing if CAAF had not yet reached the merits. *See* Pet. 13. But now that it has, *see United States* v. *Ortiz*, 76 M.J. 189 (C.A.A.F. 2017), a remand would be futile. If this Court has jurisdiction and the merits are worthy of certiorari, then these cases are an appropriate vehicle in which to decide them.

III. The Government's Merits Arguments Underscore the Petitions' Importance

Each of the government's "independent" statutory arguments is easily refuted. The government also misses the thrust of petitioners' constitutional objections, which only bolster the case for certiorari.

The government's first § 973(b) argument is that the Military Commissions Act (MCA) in fact *does* "authorize" the service of military officers as judges on the CMCR because § 950f(b)(2) contemplates the "assignment" of "a commissioned officer of the armed forces" to the CMCR. *See* Opp. 15–16. But Judges Burton, Celtnieks, Herring, and Mitchell are not "assigned" CMCR judges under § 950f(b)(2); they are "appointed" CMCR judges under § 950f(b)(3).

This distinction is more than semantic; as this Court has explained, the constitutionally significant difference between an "assignment" and an "appointment" in a similar provision "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss* v. *United States*, 510 U.S. 163, 172 (1994) (emphasis added). Unlike § 950f(b)(2), § 950f(b)(3) says nothing about military officers at all. *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The distinction between "assigned" and "appointed" CMCR judges is also fatal to the government's similar third statutory argument, that "the office of [CMCR] judge does not 'require[] an appointment by the President by and with the advice of the Senate.'" Opp. 17. Just as Congress differentiates between the office of the Chief Justice and that of the Associate Justices, 28 U.S.C. § 1, so too the MCA creates two different "offices" of judges on the same court. When President Obama nominated

and the Senate confirmed Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR, they assumed an office ("appointed judge") that, by statute, requires such nomination and confirmation—and therefore triggers § 973(b)(2)(A)(ii).

The government's contrary argument—that, facts aside, these judges can nevertheless be treated as § 950f(b)(2) assignees—raises the very Appointments Clause problem that their CMCR appointments were intended to mitigate. *See* Pet. 4–5. Unlike their CCA counterparts, CMCR judges are not "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond* v. *United States*, 520 U.S. 651, 663 (1996). Instead, CMCR judges are answerable only to the D.C. Circuit and can be removed only for "good cause." 10 U.S.C. § 949b(b)(4)(d); *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016). They are, therefore, principal officers for Appointments Clause purposes. If the MCA does not compel the conclusion that additional CMCR judges hold a civil office requiring presidential nomination and Senate confirmation, the Appointments Clause does.

The government's second statutory argument—that, per the CMCR's summary analysis in *Al-Nashiri*, "additional judges" on the CMCR do not hold a "civil office," Opp. 16–17—fares no better. OLC defines a "civil office" as "one established by statute, and . . . involv[ing] the exercise of 'some portion of the sovereign power.'" 1983 OLC Memo, *supra*, at 24. The position of "additional judge" on the CMCR is established by statute, *see* 10 U.S.C. § 950f(b)(3); and its occupants exercise "some portion of the sovereign power." *See id.* § 950f(d).

It is therefore irrelevant whether, as the CMCR held, "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 23a–24a. But even if the substance of the CMCR's work were relevant, this contention rests on the CMCR's mischaracterization of *its* function, as opposed to that of trial-level military judges at Guantánamo Bay.[5] CMCR judges are Article I judges exercising the judicial power of the United States. They hold a quintessential "civil office."

The government's final statutory argument simply rehashes *Ortiz*'s flawed, superficial logic, *i.e.*, that "'[n]othing in the text [of § 973(b)] suggests that it prohibits' an officer who assumes a prohibited office 'from carrying out his assigned military duties,'" Opp. 18 (quoting *Ortiz*), and that § 973(b)(5)'s saving clause actually *immunizes* all conduct carried out by military officers after assuming a prohibited civil office. *See id.*

This interpretation misreads the plain text of the saving clause, which insulates "any action undertaken by an officer in furtherance of *assigned* official duties." 10 U.S.C. § 973(b)(5) (emphasis added). After the 1983 OLC Memo concluded that the longstanding practice of assigning military lawyers to serve as Special Assistant U.S. Attorneys (SAUSAs) to prosecute

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5. Unlike the military commissions themselves, the CMCR hears *appeals* as an Article I court of record, *see* 10 U.S.C. § 950f(a), which is not in any sense "classic." Military commissions have only been subject to direct appellate review since 2005. *See, e.g.*, *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Nor is it "inherently military." The CMCR includes civilian judges and has exercised jurisdiction over domestic, non-military offenses. *See, e.g.*, *Bahlul* v. *United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *petition for cert. filed*, No. 16-1307 (U.S. Mar. 28, 2017).

offenses committed by civilians on military installations violated § 973(b), Congress amended § 973(b) to narrow the scope of "civil office" to exclude SAUSAs, and to insulate the thousands of prosecutions undertaken by those "assigned" officers from legal challenge. *See Ortiz*, 76 M.J. at 192 & n.1.

In other words, the focus of § 973(b)(5) was on duties carried out by military officers in civil offices to which they had unlawfully been "assigned" under the pre-1983 version of § 973(b), such as the JAG lawyers' service as SAUSAs. Because the 1983 amendments prospectively limited the definition of "civil office" to positions generally requiring an "election" or an "appointment," the saving clause's reach was, in practice, retroactive. *See Reserve Officer Holding Civil Office*, 4 CIV. L. OP. JAG A.F. 391, 391 (Feb. 14, 1991) (holding that clause applied to insulate service in a civil office only prior to September 24, 1983—the date on which § 973(b)(5) entered into force).

The government and CAAF mistakenly read the 1983 amendments to have done much more—and to have effectively repealed § 973(b)'s prohibitions altogether. On their view, the saving clause would permit military officers to accept prohibited civil offices and continue to serve on active duty without any consequence. In addition to its inconsistency with the text and purpose of the 1983 amendments, this reading is also internally incoherent; application of the saving clause to the *military* office would be pointless if the sole penalty for violating § 973(b) were, as CAAF concluded in *Ortiz*, disqualification from the unauthorized *civil* office.

The government's argument also assumes, despite the absence of any indicia of such legislative intent,

that Congress intended to abrogate the common law doctrine of incompatibility. *See Lopez* v. *Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) ("[A]n office holder was not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former. This rule is of great antiquity in the common law . . . ."). *But see Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

Not only do the text and legislative history of the 1983 amendments evince no such purpose, they point rather squarely in the opposite direction. Thus, the same section of the statute that amended § 973(b) separately authorized the President to appoint an active-duty military officer to serve as Chairman of the Red River Compact Commission, and provided that his acceptance of such an appointment "shall not terminate or otherwise affect [his] appointment as a military officer," Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(d), 97 Stat. 614, 656; *see also* S. REP. NO. 98-174, at 258 (1983).

On the government's and CAAF's reading, this proviso was wholly unnecessary. But Congress clearly disagreed, and the Department of Defense has disagreed as well; it continues to view administrative separation as the proper sanction for a violation of § 973(b) absent special circumstances not present here. *See* Political Activities by Members of the Armed Forces, Dep't of Def. Directive 1344.10 § 4.6 (Feb. 19, 2008). Thus, the appropriate remedy for the violation of § 973(b) in petitioners' cases is the nunc pro tunc

disqualification of the challenged judges from service on the CCAs. *See Ryder*, 515 U.S. at 184–85.

Any other reading of § 973(b) raises grave constitutional concerns. The government downplays those concerns by embracing *Ortiz*, which rejected a similar Appointments Clause objection because it wrongly "presumes that Colonel Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." *Ortiz*, 76 M.J. at 193; *see* Opp. 20–21.

The difficulty with this line of argument is that it turns a blind eye to the possibility that the two positions might be functionally (as opposed to formally) incompatible. If an additional judge of the CMCR (as a principal officer) could serve alongside a judge on a CCA (as an inferior officer), the same logic would allow the President to nominate (and the Senate to confirm) the sitting Secretary of Defense to also serve on a CCA. But in that scenario, there is an obvious "incongruity" in having an individual with such authority (1) serving in a second position through which he is subordinate to other Executive Branch officers; while at the same time (2) sharing decision-making authority with inferior officers who may well be unduly influenced by his principal office. *See Morrison* v. *Olson*, 487 U.S. 654, 675–76 (1988) (tracing functional incompatibility to "incongruity" of overlapping functions). This concern is especially acute where, as here, the distinct offices involve overlapping personnel—and provides yet another reason for rejecting the government's and CAAF's reading of § 973(b).

The same can be said for the serious Commander-in-Chief Clause problem that arises from military officers' service on the CMCR—because CMCR judges "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. Such a constraint on the President's power raises constitutional concerns of the first order. *See* Pet. 15. The only response the government can muster is that the D.C. Circuit refused to issue a writ of mandamus on this issue in *al-Nashiri*. Opp. 20 n.6. The far better answer is to avoid the problem by reading § 973(b) the way it has always been understood by Congress and OLC.

* *

Finally, the government insinuates that *Ortiz* (in which a petition is now pending) is the better vehicle for resolution of these statutory and constitutional questions. *See* Opp. 22. Because the government is incorrect that the Court lacks jurisdiction and that petitioners' challenges were improper from the standpoint of timing, there is no reason to wait for *Ortiz*. But if concerns about the threshold issues remain, the proper course is not to deny certiorari here, but rather to grant these petitions *and Ortiz*. As the government concedes, "petitioners would not [otherwise] be entitled to relief even if this Court granted review in *Ortiz* and opted for their position on the [merits]." *Id.*

CONCLUSION

For the foregoing reasons and those previously stated, the petitions should be granted.

Respectfully submitted,

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May 19, 2017

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV - 7 2017
OFFICE OF THE CLERK

Nos. 16-961, 16-1017, and 16-1423

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI, *Petitioner*,

v.

UNITED STATES, *Respondent*.

LAITH G. COX, *ET AL.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

KEANU D.W. ORTIZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

JOINT APPENDIX

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Petitions for Certiorari Filed: **Feb. 1, Feb. 21, & May 19, 2017**
Certiorari Granted: **September 28, 2017**

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SUPREME COURT OF THE UNITED STATES

(ORDER LIST: 582 U.S.)

THURSDAY, SEPTEMBER 28, 2017

CERTIORARI GRANTED

16-961	)	DALMAZZI, NICOLE A.
	)	V. UNITED STATES
16-1017	)	COX, LAITH G. V. UNITED STATES
	)	
16-1423	)	ORTIZ, KEANU D. V. UNITED STATES

The petitions for writs of certiorari are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether this Court has jurisdiction to review the cases in Nos. 16-961 and 16-1017 under 28 U. S. C. § 1259(3).

I. CHRONOLOGICAL LIST OF SIGNIFICANT LOWER-COURT PLEADINGS, HEARINGS, AND ORDERS

***Dalmazzi* v. *United States* (No. 16-961)**

May 12, 2016	Air Force CCA decision.
May 27, 2016	Motion for reconsideration filed.
July 11, 2016	CAAF petition for review filed.
July 18, 2016	Air Force CCA motion for reconsideration dismissed.
Aug. 18, 2016	CAAF grant of review.
Oct. 28, 2016	CAAF order to supplement record.
Nov. 21, 2016	CAAF order specifying additional issue.
Dec. 7, 2016	CAAF oral argument.
Dec. 15, 2016	CAAF decision.

***Cox* v. *United States* (No. 16-1017)**

1. ***Cox***

Apr. 29, 2016	Army CCA decision.
Oct. 3, 2016	CAAF grant of review.
Jan. 17, 2017	CAAF decision.

2. ***Craig***

May 10, 2016	Army CCA decision.
Oct. 20, 2016	CAAF grant of review.
Jan. 17, 2017	CAAF decision.

3. ***Lewis***

Mar. 29, 2016	Air Force CCA decision.
May 9, 2016	First motion for reconsideration filed.
May 16, 2016	Air Force CCA order assigning motion to "Special Panel."
May 17, 2016	Air Force CCA Special Panel order denying reconsideration.
May 30, 2016	Second motion for reconsideration filed.
Dec. 19, 2016	CAAF grant of review.
Dec. 27, 2016	CAAF decision.

4. ***Miller***

May 6, 2016	Army CCA decision.
Nov. 30, 2016	CAAF grant of review.
Jan. 17, 2017	CAAF decision.

5. ***Morchinek***

May 9, 2016	Air Force CCA decision.
Oct. 18, 2016	CAAF grant of review.
Dec. 27, 2016	CAAF decision.

6. ***O'Shaughnessy***

May 5, 2016	Air Force CCA decision.
Nov. 29, 2016	CAAF grant of review.
Dec. 27, 2016	CAAF decision.

***Ortiz* v. *United States* (No. 16-1423)**

June 1, 2016	Air Force CCA decision.
Oct. 27, 2016	CAAF grant of review.
Dec. 16, 2016	CAAF amends grant of review.
Feb. 7, 2017	CAAF oral argument.
Feb. 9, 2017	CAAF order and judgment.
Apr. 17, 2017	CAAF opinion issued.

II. *DALMAZZI* (NO. 16-961): LOWER-COURT ORDERS, OPINIONS, & RELEVANT PLEADINGS

UNITED STATES, Appellee

v.

Nicole A. DALMAZZI, Second Lieutenant

U.S. Air Force, Appellant

No. 16-0651

Crim. App. No. 38808

United States Court of Appeals for the Armed Forces

Argued December 7, 2016

Decided December 15, 2016

Military Judge: L. Martin Powell

For Appellant: *Major Johnathan D. Legg* (argued), *Brian L. Mizer,* Esq. (on brief); *Major Thomas A. Smith.*

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce,* Esq. (on brief).

Amici Curiae for Appellee: *Colonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, Major Anne C. Hsieh, Captain Carling M. Dunham, and Captain Samuel E. Landes* (on brief)—for Army Government Appellate Division. *Colonel Valerie C. Danyluk,* USMC, *Lieutenant Commander Justin C. Henderson,* JAGC, USN, *Lieutenant James M. Belforti,* JAGC, USN, and *Brian K. Keller,* Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Brigadier General John G. Baker,* USMC, *Captain*

Brent G. Filbert, JAGC, USN, and *Philip Sundel*, Esq. (on brief)—for Military Commissions Defense Organization.

PER CURIAM:

The issues presented are whether a military officer is statutorily or constitutionally prohibited from simultaneously serving as an appellate military judge on a service court of criminal appeals and as a judge on the United States Court of Military Commission Review (USCMCR). As the appellate military judge who participated in deciding Appellant's case had not yet been appointed a USCMCR judge, we hold that the case is moot as to these issues.

I. Procedural History

A military judge sitting alone convicted Appellant, in accordance with her pleas, of wrongfully using ecstasy, a Schedule I, controlled substance. The convening authority approved the adjudged sentence: a dismissal and confinement for one month. The United States Air Force Court of Criminal Appeals (CCA) affirmed the approved findings and sentence. *United States v. Dalmazzi*, ACM No. 38808, 2016 CCA LEXIS 307, at *7–8, 2016 WL 3193181, at *3 (A.F. Ct. Crim. App. May 12, 2016).

On May 27, 2016, Appellant moved the CCA to vacate its decision because of the participation of USCMCR Judge Martin T. Mitchell on the panel. On July 11, 2016, before the CCA ruled on this motion, Appellant filed a petition for grant of review at this Court. *United States v. Dalmazzi*, 75 M.J. 399 (C.A.A.F. 2016). As a result, the CCA dismissed the motion to vacate for lack of jurisdiction.

II. BACKGROUND

In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges

by ... re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate Military Judge of the United States Court of Military Commission Review."

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's court-martial. The CCA's opinion was issued on May 12, 2016, ten days after Colonel Mitchell took the oath of office as a USCMCR appellate judge but two weeks before the President signed his commission.

Appellant asserts that: (1) as a USCMCR judge, Colonel Mitchell was prohibited by 10 U.S.C. § 973(b)(2)(A)(ii) from sitting on the CCA; and (2) his service on both the USCMCR and the CCA violated the Appointments Clause of the Constitution.

III. Discussion

The Appointments Clause of the Constitution provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the

> Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. Thus, three separate actions are required for the President to appoint an "additional judge" to the USCMCR under the terms of 10 U.S.C. § 950f: (1) the President nominates a person for the position and sends his name to the Senate for confirmation; (2) the Senate confirms the nominee; and (3) the President appoints the confirmed nominee to the position. Normally, the President signs a commission as evidence of the appointment. But

> if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 156 (1803). While not necessary for the appointment, the commission is "conclusive evidence of it." *Id.* at 157. Before the issuance of the commission, the President

is free to change his mind and not make the appointment; afterwards, he is not. *See Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004).

Appellant argues that actions Colonel Mitchell took as a judge on the USCMCR before the President issued the commission were public acts that evidenced his appointment. We disagree. It is the President who must perform some public act that evinces the appointment, not the purported appointee. *See, e.g.*, *Dysart*, 369 F.3d at 1306, 1312. Other than the commission, issued on May 25, 2016, there is no evidence that the President appointed Colonel Mitchell to the USCMCR. Therefore, that is the date of his presidential appointment as judge to the USCMCR.

As Colonel Mitchell had not yet been appointed a judge of the USCMCR at the time the judgment in Appellant's case was released, the case is moot as to these issues.

IV. DECISION

The order of August 18, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Nicole A. Dalmazzi, Appellant	USCA Dkt. No. 16-0651/AF Crim.App. No. 38808 ORDER

On further consideration of the record of trial, as supplemented following the order of the Court dated October 28, 2016, it is, by the Court, this 21st day of November, 2016,

ORDERED:

That the parties brief the following specified issue:

WHETHER THE ISSUES GRANTED FOR REVIEW ARE MOOT WHERE THE RECORD REFLECTS THAT: MARTIN T. MITCHELL TOOK AN OATH PURPORTING TO INSTALL HIM AS A JUDGE OF THE U.S. COURT OF MILITARY COMMISSION REVIEW (CMCR) ON MAY 2, 2016; THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ISSUED AN OPINION IN THE UNDERLYING CASE WITH JUDGE MITCHELL PARTICIPATING IN HIS CAPACITY AS AN AFCCA JUDGE ON MAY 12, 2016; AND THE PRESIDENT DID NOT APPOINT MITCHELL TO THE CMCR UNTIL MAY 25, 2016.

The parties will brief this issue contemporaneously, and file their briefs on or before

December 1, 2016. It is further ordered that the Court will hear oral argument only on the specified issue at the hearing scheduled for December 7, 2016, and that the order allotting amicus curiae 10 minutes to present oral argument is hereby rescinded.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Nicole A. Dalmazzi, Appellant	USCA Dkt. No. 16-0651/AF Crim.App. No. 38808 ORDER

On further consideration of the granted issues, it appears that the record of trial and joint appendix contain information documenting the President's nomination of Colonel Martin Mitchell to the United States Court of Military Commission Review (CMCR), as well as the Senate's confirmation of Colonel Mitchell to that position. However, it does not appear that there is adequate evidence in the record demonstrating that Colonel Mitchell was subsequently appointed to the CMCR. Accordingly, it is, by the Court, this 28th day of October, 2016,

ORDERED:

That on or before the 8th day of November, 2016, counsel for the parties shall file documentation with the Court relating to Colonel Mitchell's 2016 appointment and commission to the CMCR, and establishing the date when he took the oath of office to execute that appointment.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Nicole A. Dalmazzi, Appellant	USCA Dkt. No. 16-0651/AF Crim.App. No. 38808 ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 18th day of August, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE, MARTIN T. MITCHELL, IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A SUPERIOR OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

Briefs will be filed under Rule 25.

The Chiefs of the Appellate Defense and Appellate Government Divisions of the United States Army, the United States Coast Guard, and the United States Navy-Marine Corps are invited to file *amicus curiae* briefs on these issues. These briefs will be filed under Rule 26.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI
United States Air Force
ACM 38808
ORDER
Panel No. 3

On 12 May 2016, this Court issued an opinion affirming the findings and sentence in Appellant's case. *United States v. Dalmazzi*, ACM 32708 (A.F. Ct. Crim. App. 12 May 2016) (unpub. op.). Appellant filed a motion to vacate this opinion on 27 May 2016. The United States filed its motion in opposition on 22 June 2016.

Appellant has since filed a petition for grant of review of her case with the United States Court of Appeals for the Armed Forces. *United States v. Dalmazzi*, __ M.J. __, No. 16-0651/AF (Daily Journal 11 July 2016). Given the petition, this Court no longer possesses jurisdiction over Appellant's case. *See United States v. Riley*, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003).

Accordingly, it is by the Court on this 18th day of July, 2016,

ORDERED:

That Appellant's Motion to Vacate is DISMISSED.

[SEAL] FOR THE COURT

LAQUITTA J. SMITH

APPELLATE PARALEGAL SPECIALIST

UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant NICOLE A. DALMAZZI

United States Air Force

ACM 38808

12 May 2016

Sentence adjudged 21 January 2015 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dismissal and confinement for 1 month.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Lieutenant Colonel Roberto Ramirez and Gerald R. Bruce, Esquire.

Before

MITCHELL, DUBRISKE, and BROWN

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

DUBRISKE, Judge:

Appellant, in accordance with her plea, was found guilty of wrongfully using ecstasy, a Schedule I controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A second charge and specification, alleging Appellant obstructed the investigation into her drug use by repeatedly dyeing her hair in an effort to avoid forensic detection, was dismissed after acceptance of her plea pursuant to a pretrial agreement.

Appellant was sentenced by a military judge sitting alone to a dismissal and one month of confinement. The general court-martial convening authority approved the sentence as adjudged.

On appeal, Appellant raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). First, Appellant alleges the military judge erred in not dismissing the charges against her due to unlawful command influence. Second, Appellant argues her sentence is inappropriately severe. Finding no error, we affirm the findings and sentence.

Background

In January 2014, the Air Force Office of Special Investigations (AFOSI) opened drug investigations against a small number of commissioned officers, including Appellant, who were stationed at six different Air Force installations. AFOSI investigators, during the course of analyzing cell phones seized during these investigations, also discovered some of these same officers had improperly disclosed proficiency testing materials for

officers operating intercontinental ballistic missile systems.

The subsequent command-directed investigation of the test compromise allegations identified almost 100 potential suspects, including Appellant. The test compromise investigation drew significant media attention, and resulted in press conferences and statements from senior leaders within both the Department of Defense and the Department of the Air Force. These statements and press conferences were almost exclusively focused on the test compromise investigation and, eventually, the disciplinary results and corrective actions stemming from the investigation. While the original drug investigations were mentioned during some senior leader statements as the reason the test compromise allegations were discovered, only generic details about the actual investigations were ever released. One senior leader, when specifically asked about the drug allegations, declined to discuss any details as the criminal investigations were ongoing.

Disciplinary action on the test compromise allegations was eventually handled by the numbered air force commander with authority over the involved officers. There was insufficient evidence to support disciplinary action against Appellant for compromising proficiency testing materials.

Appellant was eventually charged with using ecstasy on "divers" occasions and impeding the AFOSI investigation against her. After charges against her were referred to general court-marital, the basic details regarding her trial proceedings were released to the public.

Unlawful Command Influence

On appeal, Appellant claims the military judge erred in denying her motion to dismiss all charges due to unlawful command influence. Appellant, adopting her arguments at trial, primarily alleges the disciplinary fallout from the much publicized test compromise investigation, which resulted in Appellant's chain of command being relieved of their leadership positions, pressured Appellant's current chain of command to bring criminal charges against her due to fear they would likewise lose their command positions if they failed to hold Appellant accountable.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case . . . ." The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94–95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)).

We review allegations of unlawful command influence de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). "On appeal, the accused bears the initial burden of raising unlawful command influence. Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the

unfairness." *Id.* (citing *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999)). The initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Appellant must initially present "some evidence" of unlawful command influence. *Id.* (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).

After an issue of unlawful command influence is raised by some evidence, the burden shifts to the Government to rebut an allegation by persuading the court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence will not affect the findings or sentence. *Biagase*, 50 M.J. at 151. "Where, as here, the issue is litigated on the record at trial, the military judge's findings of fact are reviewed under a clearly erroneous standard, but the question of command influence flowing from those facts is a question of law that this court reviews de novo." *United States v. Jeter*, 74 M.J. 772, 778 (A.F. Ct. Crim App. 2015), *pet. rev. denied*, 75 M.J. 63 (C.A.A.F. 2015).

As an initial matter, we adopt the military judge's findings of fact as they are supported by the record. Upon our independent review of the question of law, we likewise find Appellant failed to meet her initial burden of showing the pretrial publicity and disciplinary response for the test compromise investigation constituted actual or apparent unlawful command influence as it related to the charges in her case. The record clearly establishes

the senior leader and command involvement cited by Appellant was focused almost exclusively on matters unrelated to Appellant's case. As such, the argument her command's decision to move forward on drug charges was somehow influenced by a fear of being relieved of command is speculative at best. In so holding, we would note the decision to court-martial a commissioned officer accused of repeatedly using illegal narcotics, instead of imposing some form of administrative action, is not an anomaly within the military justice system.

Moreover, as noted by the military judge, Appellant's theory that her chain of command was unduly concerned about the consequences of disciplinary inaction was rebuffed by the fact that action was not taken against her for compromising testing materials. Commanders fearful they would meet the same fate as their predecessors should have driven them to hold Appellant accountable for all possible disciplinary violations. Appellant's speculative claim is therefore insufficient in our opinion to shift the burden of proof to the Government on this issue.

Assuming, arguendo, that Appellant produced some evidence that unlawful command influence had the potential to impact the trial proceedings, we find beyond a reasonable doubt that this judge alone case was not impacted by actual or apparent unlawful command influence. An objective, disinterested member of the public, fully informed of all facts and circumstances, would not harbor a significant doubt as to the fairness of Appellant's trial. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

Sentence Appropriateness

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

After giving individualized consideration to this particular Appellant, her relatively brief record of service, the nature and seriousness of the offense, and all other matters contained in the record of trial, we decline to grant Appellant the relief she requests before this court. The approved sentence for Appellant's repeated use of an illegal drug is not unduly harsh or otherwise inappropriate in our opinion.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and the sentence are AFFIRMED.

[SEAL] FOR THE COURT
LAQUITTA J. SMITH
Appellate Paralegal Specialist

III. *Cox* (No. 16-1017): Lower-Court Orders, Opinions, & Relevant Pleadings

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Laith G. Cox, Appellant	USCA Dkt. No. 16-0635/AR Crim.App. No. 20130923 ORDER

On further consideration of the granted issues, 75 M.J. 457 (C.A.A.F. 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on April 29, 2016, and Appellate Military Judges Paulette V. Burton and James W. Herring were appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January 2017,

ORDERED:

That the order issued October 3, 2016, granting review is hereby vacated; and

That Appellant's petition for grant of review is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Laith G. Cox, Appellant	USCA Dkt. No. 16-0635/AR Crim.App. No. 20130923 ORDER

On consideration of Appellant's petition for reconsideration of this Court's Order issued September 7, 2016, it is, by the Court, this 3rd day of October, 2016,

ORDERED:

The petition for grant of review is hereby granted on the following issues:

I. WHETHER ACCEPTANCE OF APPOINTMENT AS A CMCR JUDGE TERMINATED THE MILITARY COMMISSIONS OF JUDGE HERRING AND JUDGE BURTON.

II. WHETHER, AS APPOINTED JUDGES OF THE CMCR, JUDGE HERRING AND JUDGE BURTON MEET THE UCMJ DEFINITION OF APPELLATE MILITARY JUDGE.

III. WHETHER THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATES THE APPOINTMENTS CLAUSE.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before

MULLIGAN, HERRING, and BURTON

Appellate Military Judges

UNITED STATES, Appellee

v.

Captain LAITH G. COX

United States Army, Appellant

ARMY 20130923

Headquarters, U.S. Army Maneuver Support Center of Excellence

Jeffrey R. Nance and Gregory A. Gross, Military Judges

Colonel Robert F. Resnick, Staff Judge Advocate

For Appellant: Captain Jennifer K. Beerman, JA; Mr. Frank J. Spinner, Esquire (on brief); Captain Jennifer K. Beerman, JA; Mr. Frank J. Spinner, Esquire (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major John K. Choike, JA (on brief).

29 April 2016

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BURTON, Judge:

An officer panel of sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of aggravated sexual assault of a child, two specifications of indecent liberties with a child, three specifications of sodomy with a child who had attained the age of 12 years but was under age of sixteen years, one specification of conduct unbecoming an officer, three specifications of indecent language to a child, one specification of producing child pornography, one specification of viewing child pornography, and one specification of obstructing justice, in violation of Articles 120, 125, 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, 933, 934 (2006 & Supp. IV 2011) [hereinafter UCMJ]. The panel sentenced appellant to a dismissal and confinement for forty years. The convening authority approved the findings and sentence as adjudged and credited appellant with nineteen days against the sentence to confinement.

Appellant's case is before this court for review under Article 66, UCMJ. Appellate defense counsel raises four errors, one of which merits discussion and partial relief.[1] After review of the entire record, we find no evidence to support various specifications of Charge III as being prejudicial to good order and discipline in the armed forces. We will provide relief in our decretal paragraph.

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[1] We have also reviewed those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and they are without merit.

FACTS

Appellant, a thirty-two year old, married man, met Miss DS, a fourteen year old girl,[2] on an adult-oriented website.[3] On that website, DS represented herself as a nineteen year old woman.[4] Appellant contacted DS through the website. They spoke several times on the phone and communicated through electronic media to include text messages and email. On 11 September 2011, appellant set up a time to meet DS in Norman, Oklahoma. On their first meeting appellant met DS in a parking lot across the street from where she lived with her mother and younger sisters. They engaged in sexual intercourse in appellant's vehicle and appellant took photos of DS in various stages of undress. Later that night, appellant met DS in the same parking lot. They drove to a motel where appellant engaged in anal, oral and vaginal intercourse with DS. Appellant took photographs and video-recorded the sexual acts with DS.

On 1 October 2011, appellant visited DS again. He picked her up in a parking lot near her home and

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[2] DS testified she was born on 25 September 1996. Thus at the time of the incident on 11 September 2011, she was fourteen years old.

[3] The adult-oriented website is for people who would like to indulge in their sexual fantasies, and a relationship site for people who want a fling, casual dating, or sexual encounter with men, women, transsexuals, and/or couples.

[4]The website does not allow guests under the age of eighteen to register for the website. At the time of trial DS was seventeen years old.

drove to a motel. While at the motel, they again engaged in various sexual acts to include anal, oral and, vaginal intercourse. Appellant once again took photographs and video-recorded these sexual acts.

Appellant and DS discussed her age on several occasions. DS testified that before they met, she was on the telephone with appellant while she was attending a "kid's party." When appellant inquired as to why she was at a "kid's party," she told him she was fourteen years old and he replied, "[i]t doesn't really matter. I already like you anyway." According to DS she never told him any other age other than fourteen with the exception of what he saw posted on the adult-oriented website. On the video taken on 11 September 2011, prior to any sexual acts occurring, appellant asked DS to state her name and her age, and DS responded with her name and "fourteen." DS was aware that appellant was in the Army because he told her. Law enforcement located appellant by contacting a military installation.

LAW AND ANALYSIS

In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987); *see also Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Humphreys,* 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions oflegal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner,* 56 M.J. 131, 134 (C.A.A.F. 2001). The test for factual

sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Appellant claims there is no evidence that the conduct alleged in Specifications 1, 2, 4 and 5 of Charge III was prejudicial to good order and discipline.[5] We have no dispute that appellant engaged in such conduct, as photographs and videos were admitted at trial of appellant engaging in the conduct as charged. Appellant informed DS that he was in the military and civilian law enforcement officials contacted a military installation to obtain information about appellant's location. The evidence is more than sufficient to support a finding appellant's conduct was service discrediting.

However, our review of the record discloses no evidence to show that appellant's misconduct had any impact on the good order and discipline of his unit. We find the evidence to be less than minimal and insufficient to sustain a finding of guilty as to that language.

CONCLUSION

Having completed our review and in consideration of the entire record, we AFFIRM only so much of the Specifications 1, 2, 4 and 5 of Charge III as finds:

---

[5] Appellant alleges that the evidence is factually insufficient to sustain a conviction of the specifications alleged in Charges I and III and the Additional Charge. We only address the sufficiency of Charge III and its specifications as they pertain to prejudice to good order and discipline.

Specification 1: In that [appellant], did, while on board the SS OAK HILL and/or assigned to Key West Naval Air Station,[6] on or about 10 December 2011, in writing communicate to Ms. [DS], a child under the age of 16 years, certain indecent language, to wit:

> "I would wear a mask, so all she would know is that I was hella old, and then just to make my point I would pull out of you and nut on her face. Then as it dripped down cuz she couldn't wipe it cuz her hands are tied, I'd just fuck you again,"
>
> "I was getting worried I wouldn't get to pound your sexy ass again,"
>
> "I need my little sluts pussy like now,"
>
> "you still want me to rape you,"
>
> "I wish I could come over there and fuck you all over her bed,"

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[6] In Specification 1 and 2 of Charge III, appellant was charged with "while on board the SS OAK HILL[sic]; he was found guilty except the words "SS OAK HILL" substituting therefore the words "SS OAK HILL and/or assigned to Key West Naval Air Station." We note the proper designation of this vessel is "USS Oak Hill." We hold the incorrect designation harmless in Specifications 1, 2, and 5 of Charge III.

"I could really use some pussy right now, its been fucking months,"

or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.

Specification 2: In that [appellant], did, while on board the SS OAK HILL and/or assigned to Key West Naval Air Station on about 24 December 2011, in writing communicate to Ms. [DS], a child under the age of 16 years, certain indecent language, to wit:

"remember what I said that one time about fucking you in front of her and then bustin my nut all over her face,"

"how about you just bring her alone and she can watch me fuck you and then we will see what she is up for,"

"who is [KW]? Well I'd like to fuck around with her"

"I just want her to watch me fuck you and

suck on my dick a little and video me cumming on her, you think she would come and play, and I promise I won't fuck her, thats what I want for Christmas,"

or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.

> Specification 4: In that [appellant], did at or near Norman, Oklahoma, between on and about 11 September 2011 to on or about 2 October 2011, knowingly and wrongfully produce child pornography to wit: a video of sexually explicit conduct between the said [appellant] and Ms. [DS], a child under the age of 16, and that such conduct was of a nature to bring discredit upon the armed forces.
>
> Speciation 5: In that [appellant], did while on board the SS OAK HILL, between 20 December 2011 to on or about 24 December 2011, knowingly and wrongfully view child pornography, to wit: a video of sexually explicit conduct between the said [appellant] and Ms. [DS], a child under the age of 16, and that such conduct was of a nature to bring discredit upon the armed forces.

The remaining findings of guilty are AFFIRMED. We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann,* 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States* v. *Sales,* 22 M.J. 305 (C.M.A. 1986). The maximum sentence appellant could have received included confinement in excess of 100 years. We are confident that based on the entire record and appellant's course of conduct, the panel would have imposed a sentence of at least that which was adjudged, and

accordingly we AFFIRM the sentence. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Senior Judge MULLIGAN and Judge HERRING concur.

FOR THE COURT:

[SIGNATURE]
MALCOLM H. SQUIRES, JR.
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Courtney A. Craig, Appellant	USCA Dkt. No. 16-0650/AR Crim.App. No. 20150272

ORDER

On further consideration of the granted issues, 75 M.J. 470 (C.A.A.F. 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on May 10, 2016, and Appellate Military Judges Paulette V. Burton and James W. Herring were appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January 2017,

ORDERED:

That the order issued October 20, 2016, granting review is hereby vacated; and

That Appellant's petition for grant of review is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Courtney A. Craig, Appellant	USCA Dkt. No. 16-0650/AR Crim.App. No. 20150272

ORDER

On consideration of Appellant's petition for reconsideration of this Court's Order issued 12 August 2016, it is, by the Court, this 20th day of October, 2016,

ORDERED:

That said petition for reconsideration is hereby granted, that the Order of 12 August 2016, denying the petition for grant of review is hereby vacated, and that the petition for grant of review is hereby granted on the following issues:

I. WHETHER ACCEPTANCE OF APPOINTMENTS AS CMCR JUDGES TERMINATED THE MILITARY COMMISSIONS OF JUDGE HERRING AND JUDGE BURTON.

II. WHETHER, AS APPOINTED JUDGES OF THE CMCR, JUDGE HERRING AND JUDGE BURTON DO NOT MEET THE UCMJ DEFINITION OF APPELLATE MILITARY JUDGES.

III. WHETHER THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATES THE APPOINTMENTS CLAUSE.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS
Before
MULLIGAN, HERRING, and BURTON
Appellate Military Judges
UNITED STATES, Appellee
v.
Specialist COURTNEY A. CRAIG
United States Army, Appellant
ARMY 20150272
Headquarters, Fort Riley
Charles L. Pritchard, Jr., Military Judge
Lieutenant Colonel Timothy A. Furin,
Staff Judge Advocate

For Appellant: Major Christopher D. Coleman, JA (argued); Lieutenant Colonel Charles D. Lozano, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Christopher D. Coleman, JA (on brief).

For Appellee: Captain Christopher A. Clausen, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie, III, JA; Major Daniel D. Demer, JA; Captain Christopher A. Clausen, JA (on brief).

10 May 2016

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.. [sic]

FOR THE COURT:
[SIGNATURE]
MALCOLM H. SQUIRES, JR
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Andrew K. Lewis, Appellant	USCA Dkt. No. 16-0660/AF Crim.App. No. 38671

ORDER

On further consideration of the granted issue (Daily Journal Dec. 19, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 17, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of December 19, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Andrew K. Lewis, Appellant	USCA Dkt. No. 16-0660/AF Crim.App. No. 38671 ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 19th day of December, 2016,

ORDERED: That said petition is hereby granted on the following issue:

WHETHER JUDGE MARTIN T. MITCHELL, A JUDGE ON THE COURT OF MILITARY COMMISSION REVIEW, WAS STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS, AND EVEN IF HE WAS STATUTORILY AUTHORIZED TO BE ASSIGNED TO THE AIR FORCE COURT OF CRIMINAL APPEALS, WHETHER HIS SERVICE ON BOTH COURTS VIOLATED THE APPOINTMENTS CLAUSE GIVEN HIS NEWLY ATTAINED STATUS AS A SUPERIOR OFFICER.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

IN THE UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES OF AMERICA,

Appellee,

v.

ANDRE K. LEWIS

Staff Sergeant (E-5)

U.S. Air Force,

Appellant.

MOTION TO VACATE DENIAL OF RECONSIDERATION DECISION DUE TO PARTICIPATION OF UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE MITCHELL

Special Panel

AFCCA No. 38671

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

COMES NOW Appellant, pursuant to Rule 23 of this Court's Rules of Practice and Procedure, and moves to vacate this Honorable Court's decision to deny reconsideration, dated 17 May 2016, due to the participation of United States Court of Military Commission Review ("C.M.C.R.") Judge Martin T. Mitchell.

Statement of Facts

A) Under the 2006 Military Commissions Act ("MCA"), the C.M.C.R. was the Statutory Equivalent to the Boards of Review Established by Congress Under the UCMJ in 1950.

In response to the Supreme Court's decision in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), Congress passed and the President signed the Military Commissions Act of 2006, 120 Stat 2600 ("2006 Act"). The purpose of the 2006 Act, as President Bush explained, was to establish "a comprehensive statutory structure that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants." 152 Cong. Rec. 17,189 (Sept. 6, 2006) (Message from the President).

As part of that structure, Congress agreed with the President's proposal to give the accused a right of appeal. The first level of appellate review was to be conducted by a new entity, the "Court of Military Commission Review." Congress constructed this tribunal as an agency review board within the Department of Defense, that the Secretary of Defense would establish under his control. 10 U.S.C. § 950f(a) (2006). This was also reflected in the first *Manual for Military Commissions*, which noted that the C.M.C.R. existed "[w]ithin the Office of the Secretary of Defense." R.M.C. 1201(a) (2007).

Consistent with its status as an agency review board, Congress authorized the Secretary to exercise complete control over the composition, and hence the functioning, of the C.M.C.R.. The statute made no provision for the appointment of "judges" in the

constitutional sense. Instead, the Secretary was authorized to "assign appellate military judges" to the C.M.C.R.. 10 U.S.C. § 950f(b) (2006); *see also Weiss v. United States*, 510 U.S. 163, 171-72 (1994) (distinguishing between appointing and assigning appellate military judges). These could be either a commissioned officer in the Armed Forces who was qualified to serve as a judge advocate or "a civilian with comparable qualifications." *Id.* The choice was left to the Secretary's discretion.

In either case, the statute placed no conditions on the Secretary's authority to assign or remove a C.M.C.R. judge. Indeed, while Congress prohibited unlawful attempts to coerce or influence the actions of a military commission, this protection was expressly limited to adverse personnel actions against panel members, trial and defense counsel, and military trial judges. 10 U.S.C. §949b(a) (2006). The members of the C.M.C.R. were, instead, at will employees of the Secretary.[1]

Finally, although the C.M.C.R. was intended to adjudicate the rights of an accused, it did not enjoy many of the attributes traditionally associated with a court. For example, the Secretary interpreted the statute to deprive the C.M.C.R. of any authority under the All Writs Act, which extends to "all courts

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[1] The C.M.C.R. was modeled on the service Courts of Criminal Appeals, which are established by the Judge Advocate General for each military branch. 10 U.S.C. § 866. The Judge Advocates General "may ... remove a Court of Criminal Appeals judge from his judicial assignment without cause." *Edmond v. United States*, 520 U.S. 651, 664 (1997).

established by Act of Congress." 28 U.S.C. § 1651. Whereas the statute gave the Government a limited right to file interlocutory appeals to the C.M.C.R. and to the Court of Appeals for the District of Columbia Circuit, 10 U.S.C. § 950d (2006), the Secretary promulgated a rule stating that any other "[p]etitions for extraordinary relief will be summarily denied." Rule 21(b), C.M.C.R. Rules of Practice (2008).

B) Under the 2009 MCA, Congress Reformed the C.M.C.R. and Elevated the Court to an Article I Court of Record Equivalent to C.A.A.F.

Upon taking office in 2009, President Obama exercised his authority as Commander in Chief to halt all military commission proceedings, stating that the procedures contained in the 2006 MCA had "failed to establish a legitimate legal framework." Remarks by the President on National Security (May 21, 2009). He urged Congress to reform the system in order to make "military commissions a more credible and effective means of administering justice." *Id.* In response, Congress enacted the 2009 MCA, one of the principal goals of which was to "strengthen the military commissions system during appellate review." *Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Before the Sen. Comm. on Armed Services*, 111th Cong. 5 (2009) (Statement of Sen. McCain).

The most significant structural reforms made by the 2009 Act was the abolition of the C.M.C.R. as an agency review board under the Secretary's supervision and the establishment of a new C.M.C.R. as the fifth independent Article I court of record in

the federal system.[2] 10 U.S.C. § 950f(a) (establishing the C.M.C.R. as a "court of record"); *see also* RMC 1201(a) (2012). The phrase "court of record" is a term of art that Congress uses when it intends to establish an adjudicatory tribunal that is functionally independent of the Political Branches. The 2009 Act followed this settled usage.

The C.M.C.R. exercises judicial powers to the exclusion of any other function. Absent a timely election by the accused to waive his appellate rights, the court is obligated to "review the record in each case ... with respect to any matter properly raised by the accused." 10 U.S.C. § 950f(c). Congress endowed the court with the power to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." *Id.* §950f(d). Finally, unlike this Court, the court's decisions are binding on the United States, without

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[2] There are currently four other Article I courts of record: (1) the United States Court of Appeals for the Armed Forces (10 U.S.C. § 941); (2) the United States Tax Court (26 U.S.C. § 7441); (3) the United States Court of Federal Claims (28 U.S.C. § 171); and (4) the United States Court of Appeals for Veterans Claims (38 U.S.C. § 7251). This designation has also been used with respect to territorial courts established under Article IV. *See* 48 U.S.C. § 1424(a)(3) (District Court of Guam); 48 U.S.C. § 1611(a) (District Court for the Virgin Islands); 48 U.S.C. § 1821(a) (District Court for the Northern Mariana Islands). The judges on these courts have statutory tenure to ensure their judicial independence.

the review or approval of any Executive Branch official. *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). Instead, like the judgments of a federal district court or the Court of Appeals for the Armed Forces (C.A.A.F.), the C.M.C.R.'s decisions are appealable only to the Court of Appeals for the District of Columbia Circuit and the Supreme Court. 10 U.S.C. §950g (2012).

Consistent with the C.M.C.R.'s elevated status, the 2009 Act requires the President to appoint civilian judges through the formal mechanism of the Appointments Clause. 10 U.S.C. §950f(b)(3).[3] The 2009 Act retained, however, the Secretary's authority to assign "commissioned officers of armed forces" to also serve as appellate judges. 10 U.S.C. § 950f(b)(2). But to afford these officers the same degree of judicial independence enjoyed by the civilian appointees, Congress prohibited the President or the Secretary from reassigning these officers at will. In contrast to the military courts of appeal convened by the various services under the Uniform Code of Military Justice, 10 U.S.C. § 866(a), the 2009 Act imposes a good-cause removal standard for military officers assigned to the C.M.C.R.. *Id.* §949b(b)(4)(D)

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[3] The statute is silent with respect to the removal of appointed civilian judges. Given the adjudicative nature of the tribunal, Congress is presumed to have intended them to be removable by the President only for good cause. *Wiener v. United States*, 357 U.S. 349, 356 (1958) (President has no inherent power to remove constitutionally appointed quasi-judicial officers "and none is impliedly conferred upon him by statute simply because Congress said nothing about it.").

("No appellate military judge ... may be reassigned to other duties, except ... for good cause consistent with applicable procedures under [the UCMJ]."). The statute also prohibits any person from attempting to influence (by threat of removal or otherwise) "the action of a judge" in an individual proceeding before the C.M.C.R.. *Id.* §949b(b)(1)(a). Furthermore, no one may "censure, reprimand, or admonish a judge ... with respect to any exercise of their functions in the conduct of proceedings." *Id.* §949b(b)(2).

On 20 October 2014, Secretary of Defense Chuck Hagel assigned Colonels Martin T. Mitchell and Mark L. Allred to the U.S.C.M.R. as "appellate military judges" pursuant to 10 U.S.C. § 950f(b)(2) (2012). Colonels Mitchell and Allred were sworn in as judges of that Court on 28 and 29 October 2014, respectively.[4]

C) In 2015, the Court of Appeals for the District of Columbia Circuit Suggested that the Assignment of Military Appellate Judges Under 10 U.S.C. 950f(b)(2) Violated the Appointments Clause of the Constitution and Invited the Government to Avoid this Potential Problem by Instead Appointing Additional Judges to the C.M.C.R. Pursuant to 10 U.S.C. 950f(b)(3).

In *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), the petitioner sought a writ of mandamus and prohibition ordering the disqualification of appellate

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http://www.mc.mil/ABOUTUS/USC.M.C.R.Judges.aspx (last visited 6 May 2015).

military judges assigned by Secretary Hagel to the C.M.C.R. because their assignment, as inferior officers, to serve with appointed civilian judges, superior officers, on an Article I court of record, violated the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2. The Court declined to issue the writ, but suggested "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the C.M.C.R.'s military judges. They could do so by re-nominating and re-confirming the military judges to be *C.M.C.R. judges*. Taking these steps—whether or not they are constitutionally required—would answer any Appointments Clause challenge to the C.M.C.R." *Nashiri*, 791 F. 3d at 86.

On March 14, 2016, the President forwarded Colonel Mitchell's nomination to be a judge on the U.S.C.M.C.R to the Senate for confirmation. 162 CONG. REC. 1474 (daily ed. Mar. 14, 2016). Along with Colonel Mitchell's nomination, the President also forwarded the nominations of Captain Donald C. King, U.S. Navy, Colonel Larss G. Celtnieks, U.S. Army, Colonel James W. Herring, U.S. Army, and Lieutenant Colonel Paulette V. Burton, U.S. Army. *Id.* The identical nominations were made pursuant to 10 U.S.C. § 950f(b)(3), which permits the President, with advice and consent of the Senate, to appoint "additional judges to the United States Court of Military Commission Review." *Id.* The President had previously used §950f(b)(3) to appoint two civilians, Scott L. Silliman and William B. Pollard, to serve as "additional judges" to serve alongside the "appellate military judges" previously assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2).

On 28 April 2016, the Senate confirmed Colonel Mitchell as an "additional judge" pursuant to §

950f(b)(3). On May 2, 2016, Judge Mitchell, as the presiding judge of the C.M.C.R., issued an order dissolving a court-ordered stay in *United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. May 2, 2016) (order).

Argument

I

C.M.C.R. JUDGE MITCHELL IS NOT STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS.

A) Judge Mitchell Terminated His Military Commission Upon Accepting His Current Office.

Federal law prohibits active-duty officers holding civil office in the Government of the United States. 10 U.S.C. § 973 (2012). These include positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. §973(b)(2) (2012). This statute dates to 1870, and its proponents sought to "assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle v. Warner*, 522 F. 2d 882, 884 (9th Cir. 1975). "Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers." *Id.*

Four years after *Riddle* was decided, the Department of Justice's Office of Legal Counsel was asked to opine on whether "a commissioned military officer can retain his commission if he accepts a Presidential designation as Acting Administrator of General Services." 2 U.S. Op. Off. Legal Counsel 148 (1979). Citing *Riddle*, the Office of Legal Counsel

concluded he could not. Section 973 "embodies an important policy designed to maintain civilian control of the Government." *Id.* at 150. "We therefore conclude that a military officer who does not occupy a statutory office in a military department is not eligible for designation as Acting Administrator of General Service and that, in any event, acceptance or the exercise of its functions would result in the termination of his military commission." *Id.* While §973 was later amended, the Standards of Conduct Office opined in 2002 that §973 "as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office." DoD SOCO, Advisory Number 02-21, What Constitutes Holding a "Civil Office" by Military Personnel (2002).

Upon accepting his current office, and by further performing the duties of that office, Judge Mitchell forfeited his commission as a matter of law. *Id.* Absent a second Presidential nomination and Senate confirmation of Mr. Mitchell to this Court, Mr. Mitchell's service on this Court—and its decision in this case—is void. *United States v. Janssen*, 73 M.J. 221 (C.A.A.F. 2014).

B) Even if Judge Mitchell Retained His Military Commission Upon Accepting His Current Office, the Uniform Code of Military Justice does not Authorize the Judge Advocate General to Appoint Judges of the Court of Military Commission Review to the Air Force Court of Criminal Appeals.

Having been confirmed as an "additional judge" pursuant to § 950f(b)(2), relating to civilian appointees, Mr. Mitchell no longer meets the statutory definition of either a "military judge" or

"appellate military judge," and the Judge Advocate General is without authority to appoint a judge from an Article I, court of record to the Air Force Court of Criminal Appeals. Article 26, UCMJ, provides:

> A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed for of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

10 U.S.C. § 826 (2012).

With respect to "appellate military judges," Article 66, UCMJ, requires the Judge Advocate General to establish a Court of Criminal Appeals, "which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges." 10 U.S.C. § 866 (2012).

Nothing in the plain language of Article 66, UCMJ, permits the Judge Advocate General to assign judges appointed to Article I Courts of Record to a Court of Criminal Appeals, and the Judge Advocate General's attempt to do so is no more valid than an attempt to assign a judge to this Court from the United States Court of Appeals for Veterans Claims.

Even in his former status as both a commissioned officer and an "appellate military judge" assigned to

the C.M.C.R. by the Secretary of Defense, Judge Mitchell did not meet the strict definition of "military judge" provided for in Article 26, UCMJ, in that he was not "assigned and directly responsible to the Judge Advocate General [of the Air Force]." 10 U.S.C. § 826 (2012). In accordance with 10 U.S.C. § 949b(4), Judge Mitchell was assigned and directly responsible to the Secretary of Defense, and he formerly could not have been assigned other duties unless under circumstances not applicable in this case.

However, he lost his *assigned* status to the C.M.C.R. when the President and Congress employed the appointments process to *appoint* him as an "additional judge" to that Court. He cannot simultaneously serve as an "appellate military judge" and an "additional judge" to the assigned "appellate military judges" on the C.M.C.R. when the statute expressly provides, "[j]udges on the Court shall be assigned *or* appointed[.]" 10 U.S.C. § 950f(b)(1) (2012); *United States v. Chilcote*, ("The disjunctive 'or' and the conjunctive 'and,' as used in a legislative enactment, are not the equivalent of each other and are not to be considered as interchangeable unless reasonably necessary in order to give effect to the intention of the enacting body. *Earle v. Zoning Board of Review of City of Warwick*, 96 R.I. 321 (R.I. 1963). When it is employed between two terms describing different subjects of power in a statue, the word 'or' usually implies a discretion when it occurs in a directory provision, and a choice between two alternatives when it occurs in a permissible provision.") (citing *Cherry Lake Farms v. Love*, 129 Fla. 469 (Fla. 1937); *Pompano Horse Club v. State*, 93 Fla. 415 (Fla. 1927)).

Judge Mitchell is one of five active-duty military judges in the history of the UCMJ to be directly

elevated by the President and the Senate to an Article I court of record, and he is to be congratulated. However, Judge Mitchell is now statutorily ineligible to serve on this Court.

WHEREFORE, Appellant respectfully requests this Court set aside its previously issued decision and complete appellate review of Appellant's case in accordance with Article 66, UCMJ.

II

EVEN IF C.M.C.R. JUDGE MITCHELL IS STATUTORILY AUTHORIZED TO BE ASSIGNED TO THE AIR FORCE COURT OF CRIMINAL APPEALS, HIS SERVICE ON BOTH COURTS VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS NEWLY ATTAINED STATUS AS A SUPERIOR OFFICER.

A) Congress Intended to Establish the C.M.C.R. as an Independent Article I Court.

In the 2009 MCA, Congress exercised its legislative prerogative to establish the C.M.C.R. as a "court of record." By using this designation, "the clear intent of Congress [was] to transform" the C.M.C.R. from an administrative agency within the Department of Defense "into an Article I legislative court." *Freytag v. C.I.R.*, 501 U.S. 868, 888 (1991).

The essential attributes of an Article I court are well-settled. *First*, the C.M.C.R. "exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the [2009 Act] in disputes between [criminal defendants] and the Government. ... As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the [Secretary]." *Freytag*, 501 U.S. at 890-91. By empowering it to adjudicate

cases and controversies falling within the scope of its jurisdiction, Congress vested the C.M.C.R. with "a portion of the judicial power of the United States." *Id.* at 891; *see also Shaw v. United States*, 209 F.2d 811, 813 (D.C. Cir. 1954) (observing that the Court of Military Appeals is "a court in every significant respect, rather than an administrative agency.").

Second, Congress intended the C.M.C.R. to be "independent of the Executive and Legislative Branches." *Freytag*, 501 U.S. at 891. Like the judgments of its sister Article I courts, the C.M.C.R.'s "decisions are not subject to review by either Congress or the President," *id.* at 892, but rather are "subject to reversal or change only when challenged in an Article III court." *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (D.C. Cir. 2012). Thus, unlike the service Courts of Criminal Appeals, the C.M.C.R. is neither "directed" nor "supervised" by any other presidentially appointed Executive Branch officials. *Edmond*, 520 U.S. at 663.

Of greatest relevance to this case, Congress also endowed the court's members with good-cause tenure to shield them from the threat of removal at will by the Executive. The civilian appointees on the C.M.C.R. cannot be removed by the President "except under the *Humphrey's Executor* standard of inefficiency, neglect of duty, or malfeasance in office," which is tantamount to "good-cause tenure." *Free Ent. Fund v. Pub. Co. Acctg. Oversight Bd.*, 130 S.Ct. 3138, 3148-52 (2010) (quotation omitted); *see also MFS Securities Corp. v. S.E.C.*, 380 F.3d 611, 619 (2d Cir. 2004) (although the organic statute is silent on removal, it is "commonly understood" that the President's power to remove an SEC commissioner is limited to "inefficiency, neglect of duty or malfeasance in office.") (quotation omitted).

The sole purpose of giving Article I judges statutory tenure is to ensure that they are able to "operate free of presidential direction and supervision." *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see also Morrison v. Olson*, 487 U.S. 654, 693 (1988) (noting that limits on the removal power are "essential ... to establish the necessary independence of the office"); *Wiener*, 357 U.S. at 356 (describing good-cause tenure as "involving the rectitude of the member of an adjudicatory body"). The Supreme Court has long recognized that "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).

The provision of statutory tenure is "not an end in itself," but rather "a means of promoting judicial independence, which in turn helps to ensure judicial impartiality." *Weiss*, 510 U.S. at 179. The core meaning of "impartiality" in this context is "being free from any personal stake in the outcome of the cases to which [a judge] is assigned." *Repub. Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring); *see also id.* at 776 (collecting cases). If a military judge on the C.M.C.R. knows that his professional future lies in the unfettered discretion of one of the parties to a dispute before him, it is difficult to believe that he will not have a personal stake in the outcome, especially given the politically contentious nature of military commission proceedings. *Id.* at 789.

Moreover, "the public's confidence" in the system is arguably "undermined simply by the possibility that judges would be unable" to suppress such parochial concerns. *Id.*

Accordingly, when Congress designated the C.M.C.R. as a court of record, it signaled its intent to

enhance the credibility of the system of appellate review by giving the accused a heightened level of due process. The procedural integrity associated with a court of record, coupled with its authority to exercise "broad remedial powers" within the scope of its jurisdiction, gives reviewing courts "greater confidence in the judgment's validity." *Boumediene v. Bush*, 553 U.S. 723, 782 (2008). Congress therefore subjected the findings and sentences of military commissions, which are not courts of record, to direct review by an Article I court that is intended to be "disinterested in the outcome and committed to procedures designed to ensure its own independence." *Id.* at 783.

B) Assigning a Superior Officer Appointed to an Independent Article I Court to a Court of Criminal Appeals Comprised of Inferior Officers Violates the Appointments Clause.

Generally speaking, military officers, "because of the authority and responsibilities they possess, act as 'Officers' of the United States" in the constitutional sense of the term. *Weiss*, 510 U.S. at 169. As such, military officers, including "those serving as military judges must be appointed pursuant to the Appointments Clause." *Id.* at 170. There is also no dispute that "[m]ilitary officers *performing ordinary military duties* are inferior officers," since "no analysis permits the conclusion that each of the [thousands of] active military officers ... is a principal officer." *Id.* at 182 (Souter, J., concurring) (emphasis added). Ordinarily, then, an active duty military officer's commission to his current rank, which always requires a Presidential appointment, is sufficient to satisfy the strictures of the Appointments Clause. 10 U.S.C. § 531(a) (original appointments); *id.* §624(c) (promotions).

In *Weiss*, the Supreme Court concluded that military officers assigned to sit as appellate judges on the service Courts of Criminal Appeals act as inferior officers. This finding was rooted in 1) the total oversight over the military officers assigned to sit on the services respective Courts of Criminal Appeals from within the Executive Branch and 2) the fact that their judicial duties to regulate the good order and discipline of service members under the UCMJ was consistent with the general responsibilities given to all other commissioned officers. *Id.* at 170-71, 174-76; *id.* at 196 (Scalia, J., concurring). Thus, a military officer's assignment to an intermediate service court does not offend the Appointments Clause because they are performing duties within the scope of an office to which they were properly appointed, and supervised at all times by superior officers within the Executive Branch.

Three years later in *Edmond*, the Supreme Court reiterated that *none* of the judges on the services' Courts of Criminal Appeals, including civilians appointed by a Department Head, qualify as principal officers. The Court reached this conclusion for two reasons. First, these judges are subject to substantial administrative supervision and oversight by the Judge Advocates General of their respective services. In particular, a Judge Advocate General may "remove a Court of Criminal Appeals judge from his judicial assignment without cause," which "is a powerful tool for control." *Edmond*, 520 U.S. at 664. Secondly, these judges are powerless "to render a final decision" that is binding on the United States "unless permitted to do so by other Executive officers," namely the C.A.A.F., which, like the C.M.C.R., is an Article I court of record composed

Presidential appointees. *Id.* at 665; *see also Whether the Special Master for TARP Executive Compensation is a Principal Officer*, 34 Op. O.L.C. __, 2010 WL 4963118, at *7-8 (Nov. 5, 2010) (opining that the Special Master is an inferior officer because he "is removable at will by the Treasury Secretary" and nothing "preclud[es] the Treasury Secretary from reviewing and revising [his] determinations.").

The consequence in this case is clear. "If military judges were principal officers, the method of selecting them ... would [have] amount[ed] to an impermissible abdication by both political branches of their Appointments Clause duties." *Id.* at 189-90 (Souter, J., concurring); *see also United States v. Libby*, 429 F.Supp.2d 27, 43 n.15 (D.D.C. 2006) (the United States Attorney is an inferior officer and thus "cannot be given duties [by the Attorney General] that would elevate him to a 'principal officer.'").

By contrast, C.M.C.R. judges are "principal" officers for Appointments Clause purposes. *Copyright Royalty Bd.*, 684 F.3d at 1338-40 (Copyright Royalty Board judges were principal officers because they were not removable at will by the Librarian of Congress and their decisions were not reversible by any Executive Branch official); *Soundexchange, Inc. v. Librarian of Congress*, 571 F.3d 1227, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (same); *United States v. Libby*, 498 F.Supp.2d 1, 13 (D.D.C. 2007) ("[I]f the scope of authority given to the Special Counsel by the [Attorney General] encompassed duties that no inferior officer could possess, this [would be] strong evidence that the Special Counsel is a principal officer for Appointments Clause purposes.").

Besides acting as "a bulwark against one branch aggrandizing power at the expense of another branch," the Appointments Clause is designed to "preserve[] another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quotation omitted). "In the Framers' thinking," the Clause's "strict requirements" for choosing the highest ranking positions in the Government promotes democratic accountability by forcing the President and the Senate to publicly share the responsibility "for injudicious appointments." *Weiss*, 510 U.S. at 186 (Souter, J., concurring); *Edmond*, 520 U.S. at 663 (the Clause was "designed to preserve political accountability relative to important Government assignments"). The Constitution endeavors to make the "officers of the United States ... the choice, though a remote choice, of the people themselves." The Federalist No. 39 (Madison).

The assignment of inferior officers and appointment of principal officers to a single judicial tribunal itself violates the Appointments Clause. A mixed body of this sort is constitutionally suspect for two basic reasons. *Cf. Nguyen v. United States*, 539 U.S. 69 (2003) (interpreting statute to bar an Article IV federal judge from sitting on Ninth Circuit panel otherwise comprised of Article III judges in order to avoid question of whether such an assignment was constitutional).

First, the inferior officers are necessarily subordinate to some other superior officer in the Executive Branch. *Edmond*, 520 U.S. at 662 ("Whether one is an 'inferior' officer depends on whether he has a superior."). It is unclear, to say the

least, how an inferior officer is supposed to exercise supervisory authority over a principal officer on the same judicial tribunal. For the military officers at issue here that superior is the Judge Advocate General. They are all therefore mere agents of the Judge Advocate General. Insofar as he can pack the Court of Criminal Appeals with military officers, he is able to exercise an indirect veto over the President's Senate-confirmed appointees on all matters coming before the Court of Criminal Appeals. This kind of super-superior officer, whose will is expressed entirely *sub rosa* through a multiplicity of subordinates in tandem with Presidential appointees muddles the very lines of accountability the Appointments Clause aims to make transparent.

Second, it allows the Executive Branch to use rulemaking to structure government offices in a way that marginalize, if not directly subordinate, the principal officers Congress believed would be actually responsible for policy making. Indeed, unless appointed by the President and confirmed by the Senate, the judges of the Courts of Criminal Appeals operating within the Department of Defense must be military officers. *Janssen*, 73 M.J. at 225. And the Judge Advocate General selects from these "appellate military judges" and designates one of them Chief Judge. 10 U.S.C. 866(a) (2012). Thus, aside from the sheer numerical superiority of the military officers on the Court of Criminal Appeals, Article 66, UCMJ, is being implemented in a way that puts military officers, and by extension the Judge Advocate General, in the position to exercise a formal supervisory authority over the lone superior officer on the Court of Criminal Appeals.

Indeed, Justice Alito highlighted precisely this problem in *DoT v. Association of American Railroads*, 135 S.Ct. 1225, 1239 (2015). The assignment of Amtrak's President raised constitutional problems similar to those in this case, insofar as Amtrak's board operates, like this Court, as an independent multimember body. Justice Alito concluded that any member could "cast the deciding vote with respect to a particular decision. One would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer." *Id.*

Finally, the duties of Court of Criminal Appeals judge are not germane to those of the judges of C.M.C.R. *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (holding a second appointment required if duties of appointed officer are not germane to the duties of the appointed office). While Congress has the unquestioned power to try alien, unprivileged belligerents under the UCMJ, *Hamdan*, 548 U.S. 557 (2006); Article 21, UCMJ, it has established an alternate criminal code applicable only to non-citizens. 10 U.S.C. § 948a (2012). Thus there is no overlap in jurisdiction between the jurisdiction of the Court to which Judge Mitchell has been appointed and this Court. Indeed, Congress stripped military commissions of key attributes of military justice such as Articles 10 and 31, UCMJ. 10 U.S.C. § 948b (2012).

Moreover, the "judicial construction and application" of the UCMJ by this Court and C.A.A.F., "while instructive, is therefore not of its own force binding" on Judge Mitchell and his fellow judges of the C.M.C.R. *Id.* This has led the C.M.C.R. to abandon long-standing military precedent, and created a split between the C.A.A.F. and the

C.M.C.R. *See, e.g. United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. October 10, 2014) (published opinion) ("We are faced with choosing between a strict, literal application of the five-day rule in a fashion equivalent to that employed under Article 62 of the UCMJ, and the less literal computation of time rule applied by federal circuit courts of appeal when resolving timeliness appellate questions under 18 U.S.C. § 3731.") . In short, Judge Mitchell has been appointed to a Court with personal jurisdiction only over aliens, subject matter jurisdiction over statutorily defined crimes against the law of war, and that is not constrained by the decisions of its sister Court, the C.A.A.F. His duties on this Court are not constitutionally germane to his status as an appointed Article I judge.

"The Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Janssen*, 73 M.J. at 221 (citation omitted). In the wake of his appointment to an Article I Court, his participation in this case renders this Court's decision void.

WHEREFORE, Appellant respectfully requests this Court set aside its previously issued decision to deny reconsideration and allow the original panel assigned to Appellant's case to determine whether to grant or deny Appellant's motion for reconsideration.

Respectfully submitted,

[SIGNATURE]
THOMAS A. SMITH, Maj, USAF
Appellate Defense Counsel
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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Appellate Government Division on 30 May 2016.

Respectfully submitted,

[SIGNATURE]
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UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES,	)	ACM 38671
Appellee	)	
	)	
v.	)	
	)	ORDER
Staff Sergeant (E-5)	)	
ANDRE K. LEWIS,	)	
USAF,	)	
Appellant	)	Special Panel

Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery. On 29 March 2016, this Court issued our opinion, modifying the findings in part and reassessing the sentence. In that opinion, we incorrectly stated Appellant was convicted of adultery, but then correctly stated in footnote 2 of the opinion that Appellant was acquitted of that offense. At all times relevant to our appellate review of Appellant's case, the judges of this Court were cognizant of Appellant's acquittal on the charge of adultery.

On 9 May 2016, pursuant to Rule 19 of this Court's Rules of Practice and Procedure and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant moved this court to reconsider our

decision.[1] In conjunction with the Motion for Reconsideration, Appellant submitted a Motion to File Appendix to Motion for Reconsideration under Seal and a Motion to Attach Appellant's declaration, dated 24 April 2016. The Government opposed the Motion for Reconsideration.

Accordingly, it is ORDERED this 17th day of May, 2016:

1) Appellant's Motion to Attach is GRANTED.

2) Appellant's Motion to File Appendix to Motion for Reconsideration under Seal is GRANTED. Appellant's declaration will be sealed and any copies in the possession of appellate government counsel may be retained solely for the purpose of fulfilling their appellate responsibilities and subsequently destroyed.

3) Appellant's Motion for Reconsideration is DENIED. Appellant fails to show that any grounds for reconsideration exist. *See United States Air Force Court of Criminal Appeals Rules of Practice and Procedure*, Rule 19.2. *See also United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973) (evidence not presented at trial cannot be used to support or reverse a conviction).

4) This Court's opinion, dated 29 March 2016, shall be corrected by striking out the first sentence of the opinion and replacing it with the following language: Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault,

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[1] This Court had granted an enlargement of time to Appellant for filing of his motion to reconsider.

aggravated sexual contact, abusive sexual contact, and assault consummated by a battery, in violation of Articles 107, 120, and 128, 10 U.S.C. §§ 907, 920, and 928.[2]

[SEAL] FOR THE COURT

[SIGNATURE]

LAQUITTA J. SMITH

Appellate Paralegal Specialist

[2] A corrected copy is attached to this Order.

UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES,	)	ACM 38671 (RECON)
Appellee	)	
	)	
v.	)	
	)	ORDER
Staff Sergeant (E-5)	)	
ANDRE K. LEWIS,	)	
USAF,	)	
Appellant	)	Special Panel

It is by the Court on this 16th day of May, 2016,

ORDERED:

That the Record of Trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review, pursuant to United States Air Force Court of Criminal Appeals Rule 19.2 (d).

The Special Panel in this matter shall be constituted as follows:

ALLRED, MARK, L., Colonel,

Chief Appellate Military Judge

MITCHELL, MARTIN, T., Colonel,

Senior Appellate Military Judge

ZIMMERMAN, LE, T., Colonel,

Appellate Military Judge

[SEAL] FOR THE COURT

[SIGNATURE]

LAQUITTA J. SMITH

Appellate Paralegal Specialist

****CORRECTED COPY – DESTROY ALL OTHERS****

UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ANDRE K. LEWIS

United States Air Force

ACM 38671

29 March 2016

Sentence adjudged 21 April 2014 by GCM convened at Misawa Air Base, Japan. Military Judge: Matthew Stoffel (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Captain Tyler B. Musselman and Gerald R. Bruce, Esquire.

Before

ALLRED, TELLER, and ZIMMERMAN

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

TELLER, Senior Judge:

Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, assault consummated by a battery, and adultery, in violation of Articles 107, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 928, 934. Appellant was convicted, contrary to his pleas, by a military judge sitting alone of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery, in violation of Articles 107, 120, and 128, 10 U.S.C. §§ 907, 920, and 928.

The court sentenced him to a dishonorable discharge, confinement for 6 years, reduction to E-1, and forfeiture of all pay and allowances. The sentence was approved, as adjudged, on 1 September 2014.

The court sentenced him to a dishonorable discharge, confinement for 6 years, reduction to E-1, and forfeiture of all pay and allowances. The sentence was approved, as adjudged, on 1 September 2014.

Appellant argues that (1) his conviction for aggravated sexual assault of one victim is factually insufficient; (2) his convictions for abusive sexual contact, aggravated sexual contact, and assault consummated by a battery of a second victim (and the related false official statement conviction) are legally and factually insufficient; (3) the remaining conviction for false official statement is legally and factually insufficient; and (4) he was prejudiced by the re-assignment of a paralegal who assisted in his

defense to the base legal office that prosecuted his case.[1] We find some merit in Appellant's factual sufficiency argument concerning the aggravated sexual contact conviction and modify the findings and reassess the sentence as described below. We affirm the remainder of the findings.

Background

Appellant was convicted of misconduct related to two separate incidents approximately 18 months apart. The first incident, which occurred in November 2011 as Appellant was preparing to leave Ramstein Air Base (AB), Germany, involved sexual acts with Staff Sergeant (SSgt) HP while she was substantially incapacitated. The second, which occurred on or about 13 April 2013 at Misawa AB, Japan, involved several charges related to unwanted sexual contact and battery of SSgt YM.[2]

Germany Offenses

There was substantial testimony about the interaction between Appellant and SSgt HP during the evening prior to the sexual misconduct in Germany. SSgt HP was part of a group of Airmen celebrating her birthday and a colleague's impending departure. Appellant had recently returned from a deployment. Appellant had originally planned to go out with a friend of his, SSgt MS, and a friend of

---

[1] The third and fourth assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Although Appellant was charged with sexual and other misconduct related to a third victim in 2012, he was acquitted of all of those charges.

SSgt MS, Mr. RZ. Prior to going out, Appellant parked his car at Mr. RZ's home. In an apparent coincidence, Appellant and SSgt HP ran into each other at a dance club off-base.

The evidence is compelling that SSgt HP became severely intoxicated while at the club. SSgt HP testified that she recalled dancing with Appellant for a few songs then going to sit down with a group of friends. After that, with the exception of two brief memories, she has no recollection of events until she woke up with Appellant at Mr. RZ's home. The two brief memories both involve sexual acts with Appellant which will be discussed in more detail below.

While there was no independent evidence of the circumstances surrounding Appellant's and SSgt HP's departure from the club, Appellant gave a description of the events to agents from the Air Force Office of Special Investigations (AFOSI). The written transcript of the interview and Appellant's written statement were admitted into evidence by the Government. Appellant told AFOSI that he noticed bouncers preparing to escort SSgt HP from the club because of her obvious intoxication and he decided to take her outside to get a taxi. Appellant could not find a taxi willing to take SSgt HP because of her state of drunkenness. At some point, SSgt HP also began to vomit, complicating efforts to convince a taxi to take her home. After his initial efforts to find a taxi for SSgt HP failed, Appellant went back into the club to persuade someone from SSgt HP's group of friends to take responsibility for her. According to Appellant, none of the friends he could find were amenable. Other witnesses who had accompanied SSgt HP to the club testified that they saw Appellant

during this time and he did not ask them to help SSgt HP get home. Appellant told AFOSI that he then decided to get his belongings and get a taxi himself to take SSgt HP home. When Appellant left the club, SSgt HP was no longer in the parking lot, and a bouncer suggested he check the "drunk tent," a small shelter in the parking area to keep intoxicated patrons from being injured. Appellant found SSgt HP passed out in the drunk tent, and after about 40 minutes, finally found a taxi willing to take them. Appellant described the ride as "a bit of a ways" from the club and told agents that the taxi had to stop once during the trip for SSgt HP to step out to vomit. When they arrived at SSgt HP's home, Appellant did not just drop her off, but rather paid for the taxi and got out with SSgt HP. Shortly thereafter, Appellant discovered that SSgt HP did not have her keys. Although SSgt HP easily got in the next day through a partially barred door, she was unable to do so that night and Appellant had no way of getting SSgt HP into the house. Appellant took SSgt HP to the partially open garage and set out a tarp for her to lie down on while he tried to arrange for a ride to Mr. RZ's house.

There is scant evidence of what time Appellant and SSgt HP had left the club. One witness estimated that she arrived with SSgt HP at 0115, stayed for two or three hours, and saw Appellant picking up his coat as she was leaving the club. By her estimate, that would have been approximately 0415. Appellant's cell phone showed a text from Appellant to SSgt MS at 0458, apologizing for leaving the club without him, but making no mention of needing to be picked up from SSgt HP's home. Appellant sent another text message to SSgt MS at

0502 describing SSgt HP as "almost dead." Less than 10 minutes later, Appellant sent a text to SSgt MS, asking him to send a taxi to SSgt HP's home to pick him up. His cell phone memory also indicated several phone calls and texts from 0506 to at least 0600 that are consistent with Appellant's account of the time he spent in the garage of SSgt HP's home.

Appellant was eventually successful in getting his friends to pick them up from SSgt HP's house. Around 0600, SSgt MS and Mr. RZ arrived at SSgt HP's home in a taxi to take Appellant and SSgt HP to Mr. RZ's house. While Appellant's friends testified that SSgt HP was lucid when she arrived at the house, the evidence of bias and lack of candor with law enforcement render that testimony unworthy of belief.

The primary evidence relating to the charged sexual acts comes from Appellant, although SSgt HP testified about two "flashes" of memory. According to Appellant, SSgt HP lay down on the guest room futon, and rather than joining her, he lay down on the floor. After about 30 minutes, he asserts, she verbally invited him to have sex with her, but he demurred. After 10 minutes, he decided to check on her, and she pulled him onto the futon by his belt. According to Appellant, despite her intoxication to the point of passing out when they left the club, SSgt HP had recovered enough to become the sexual aggressor. His version of events describing himself as reluctantly acceding to her sexual advances was unconvincing in light of the evidence of her state of intoxication just hours earlier. SSgt HP testified that she had only two brief recollections between sitting down at the club and waking up the next morning late for work. The first memory started with her

being "face down" on a bed with a person who she later identified as Appellant penetrating her from behind. When asked to describe her position more fully, she testified,

> [SSgt HP:] Um, I was, yeah I was face down. Um, I came from my face up, up from the bed, him, to look behind me [the witness waived her left hand up]. Um, my, um, my legs were hanging over the edge of the bed. Um, my knees, well, my knees were at the edge of the bed.
>
> [Trial Counsel:] And where were your stomach and chest with respect to the bed?
>
> [SSgt HP:] I'm not 100% sure. I pushed up and looked back.
>
> [Trial Counsel:] Did you—how long do you—how long was this piece of memory that you have?
>
> [SSgt HP:] Seconds.

SSgt HP's next recollection was being in the shower with Appellant, but she did not recall any sexual acts during that brief memory.

The next morning, Appellant took SSgt HP to work, where the allegations came to light. Appellant woke SSgt HP up at approximately 1100 because he knew she was scheduled to work. He drove her to her house, where she entered through the partially barred door and changed into her uniform. Appellant then drove her to work. After contacting some friends who were at the club with her, she spoke to her supervisor. She told him that she had become intoxicated, that she remembered Appellant penetrating her, and that she had not wanted that to

happen. The incident was investigated by AFOSI. During the investigation Appellant made specific statements of fact about interactions he had with SSgt HP's friends at the club that, according to the testimony of these individuals, did not occur. No action was taken against Appellant at that time.

Japan Offenses

The evidence surrounding Appellant's offenses in Japan is more complete. Unlike the offenses in Germany, this victim's intoxication did not impair her memory, and she testified fully about Appellant's conduct.

Appellant arrived at Misawa AB, Japan, in March 2013 and soon became friends with the victim, SSgt YM. SSgt YM served as Appellant's informal sponsor when he first arrived, and they worked together on the same shift in one of the base dining facilities. Although SSgt YM was in a relationship with Sergeant First Class (SFC) JJ, she and Appellant were good friends and often socialized together.

On 12 April 2013, after a night of drinks and dancing, Appellant and SSgt YM got a suite in on-base lodging. Originally, SSgt YM planned to go out with SFC JJ and perhaps some others to have some drinks. Ultimately SFC JJ was unable to go out because of his duties. Appellant agreed to go out with SSgt YM, but no one else wanted to join them. The two went to a few different bars, ending up at the on-base club, where Appellant tried to teach SSgt YM salsa dancing. While both Appellant and SSgt YM were drinking, neither was substantially intoxicated. A base curfew policy required Airmen in the rank of SSgt or below to be either on base or in their residence by midnight. It was not unusual for non-

commissioned officers subject to the curfew who lived off base to get a room at the on-base lodging facility so they could spend the night on base after going to the club. SSgt YM agreed to get a two-room suite at lodging, planning for her to spend the night in the bedroom and for Appellant to sleep on the sofa in the living room.

The evidence conflicts concerning what happened after the two arrived at lodging. SSgt YM testified as to her recollection of events, and Appellant made statements about the events which were later admitted into evidence. According to both accounts, SSgt YM was disappointed and angry that SFC JJ did not make it a priority to come out with her that night.

SSgt YM testified that as soon as they got in the elevator, Appellant unexpectedly put his arms around her from behind with a "pretty firm grip." Although she testified that she did not want him to place his arms around her and was hoping he would let go, she did not say anything to him. After they got in the room, Appellant removed his arms and SSgt YM sat down in an upholstered chair. Appellant pulled a table next to SSgt YM and began to aggressively ask her if she would have sex with him. SSgt YM testified that she told him no. SSgt YM described how Appellant would use his hand to turn her face back towards him whenever she looked away. SSgt YM testified that he then began to ask her just to kiss him; "[h]e grabbed my, he grabbed my head along my jaw and chin, and he pulled my face towards his and told me to kiss him, and he pressed my face up against his." She testified about her perception of the force used by Appellant.

[Trial Counsel:] What level of force was he using at that particular point?

[SSgt YM:] Um, he was very aggressive. If I were to try to get away, I wouldn't have been able to.

[Trial Counsel:] What makes you say that you wouldn't have been able to get away from him?

[SSgt YM:] I remember the grip on my face being very tight. And if I tried to turn my head, he would turn it back towards his.

[Trial Counsel:] Did he actually succeed in kissing you while he was doing this?

[SSgt YM:] Yes, ma'am.

[Trial Counsel:] What was your reaction when he was doing this to you?

[SSgt YM:] I was scared.

[Trial Counsel:] Can you go into more detail about why you were scared?

[SSgt YM:] Um, I was in shock that it was happening, and I didn't know what to do right at that moment. I was afraid that if I tried to get away, that something was going to happen to me.

[Trial Counsel:] When you say something was going to happen to you, what you mean by that?

[SSgt YM:] Um, with the way he was being aggressive, I didn't know what else could happen. Not necessarily that he was going to try to hit me, but I didn't know what was going to happen.

[Trial Counsel:] Did you kiss him back at any point?

[SSgt YM:] Yes, ma'am. I did.

[Trial Counsel:] And why did you kiss him back?

[SSgt YM:] I thought that if I kissed him back, he would leave me alone.

SSgt YM testified that during this time Appellant also touched her breasts. She testified that while Appellant was kissing her, and she continued to protest, Appellant placed his hands down the front of her shirt and touched her breasts, although she could not recall whether it was directly or through her clothing.

[Trial Counsel:] When he put his hands down your shirt, what exactly did he touch?

[SSgt YM:] He touched my breasts.

[Trial Counsel:] Did he touch your breasts through—did he actually touch the skin of your breasts, or was he just touching some article of clothing?

[SSgt YM:] I don't remember.

[Trial Counsel:] Could you feel his hands actually touching your breasts?

[SSgt YM:] I remember feeling them touch the top of my chest, but I don't remember if they touched my actual—the lower part of my breasts.

[Trial Counsel:] Is it fair to say he was touching the upper parts of your breasts?

[SSgt YM:]: Yes, ma'am.

She described the level of force used to touch her breasts as "maybe a three or four" on a scale of one to ten. She successfully pushed his hands away. She also testified that Appellant removed his shirt and "grabbed [her] hands and put them on his chest, and he also made [her] kiss his chest." She described the level of force he used as a seven out of ten, and stated that she was unable to pull her hands away. SSgt YM testified that after he tried unsuccessfully to get her to kiss him, Appellant asked if he should get a separate room. When she replied that he should, Appellant left.

After Appellant left the room, SSgt YM exchanged a series of calls and instant messages with SFC JJ. SSgt YM asked him to come to the room, but SFC JJ initially declined. In one message, she told SFC JJ, "I OBVIOUSLY NEED U [sic] HERE." She explained the lack of any specific reference to Appellant's conduct as an attempt to avoid making SFC JJ upset before he arrived, but said she wanted him there because she "was afraid" Appellant would come back. The military judge later clarified with her that her fear was not for her physical safety, but instead that Appellant "could have been more aggressive with trying to get [her] to have sex with him or kiss him."

Appellant did in fact return to SSgt YM's room about 20 minutes after he left. He knocked on the door, and SSgt YM, feeling "pretty sure" that it was Appellant, opened the door. SSgt YM testified that over the next three to four minutes Appellant resumed his entreaties to have a relationship with him, again using a force of about seven to bring her lips to his and bring her hands to his chest. She also recounted how he "in the same manner as before" placed his hands down her shirt. She described this

interaction as occurring with her seated on the couch and Appellant kneeling in front of her. She further testified that after getting up to leave, Appellant again tried to pull her towards him to kiss him, and as she was trying to pull away, her arm came free and she hit herself in the mouth with her phone. Specifically, she said that he placed a hand around each of her wrists and tried to pull her towards him using a force of nine out of ten. She testified:

> [Trial Counsel:] And so did he have one hand around each wrist?
>
> [SSgt YM:] Yes, ma'am.
>
> [Trial Counsel:] Were you holding anything in either of your hands?
>
> [SSgt YM:] Yes, ma'am. I had my phone in my right hand.
>
> [Trial Counsel:] And so can you describe how hard you were pulling away—trying to pull away from him?
>
> [SSgt YM:] It—I would have to put a lot of force behind it.
>
> [Trial Counsel:] How long would you say that he was holding her [sic] hands in that particular position?
>
> [SSgt YM:] Just a few seconds.
>
> [Trial Counsel:] How long did you have to pull away before you were successful?
>
> [SSgt YM:] I'd say maybe 2 to 3 seconds.

[Trial Counsel:] Was it something—were you able to pull away right away or did it take some more effort?

[SSgt YM:] It took a little bit of effort.

[Trial Counsel:] What happened when—after you were successful in pulling away?

[SSgt YM:] I hit myself in the mouth with my phone, and once I realized I was bleeding, I went into the bathroom.

The military judge later followed up to attempt to clarify the degree of force used.

[Military Judge:] There were several times where trial counsel asked you how much force it was that Sergeant Lewis applied to you and you described it on a scale of 1 to 10. Can you tell me what one means and what 10 means?

[SSgt YM:] One would be if I could easily just roughly take my hands away. Ten is there is no way I could remove myself or no way I could remove myself from his grip.

[Military Judge:] So you had described that when he had his hands on your wrists trying to pull you towards him, you described that as about a force of a nine?

[SSgt YM:] Yes, sir.

[Military Judge:] So were you able to pull your hands away or did he let your hands go?

[SSgt YM:] I think it was probably a combination of the two. I remember still—I remember having to put a lot of force behind pulling my hands away, but I think he may have let me go at the same time.

[Military Judge:] So if I understand it you had to use a lot of force to pull away, but you think that at some point when he realized you were—really did not want his hands on your wrists that he then let go?

[SSgt YM:] Yes, sir.

[Military Judge:] And is that when your hands came back toward your face?

[SSgt YM:] Yes, sir.

On cross-examination, SSgt YM agreed that she never contended that Appellant intended for the phone to hit her mouth, and agreed the contact was accidental. SSgt YM testified that after she went to the bathroom to check her injury, she and Appellant had a brief, heated conversation, and then Appellant left the room. SFC JJ arrived shortly afterwards, and after some discussion with SSgt YM, SFC JJ reported the incident to security forces.

The investigation was referred to AFOSI, who initiated a pretext phone call from SSgt YM to Appellant and then called Appellant in for an interview. In both the interview and the pretext phone call, Appellant contended that there was no contact beyond mutual kissing. He asserted that once they were in the room, the space between them "closed up" and they kissed. He told the agents that his hands were on SSgt YM's hips while they kissed. He told the agents that they first kissed near the door, then had a conversation about relationships as they sat down in the living area. He said SSgt YM got emotional talking about SFC JJ and they hugged, which led to another kiss. He stated after the kiss SSgt YM felt guilty, and he brought up again that he should get his own room. When asked if SSgt YM

displayed any physical resistance, Appellant said after the second kiss they just stopped and that "there was no tug-of-war at all." Appellant did volunteer that he returned to SSgt YM's room after getting his own, but at first stated that they just talked during his second visit to the room. As the interview progressed, Appellant's account of the second visit changed, and Appellant told AFOSI that they kissed during the second visit as well. When asked if anything else happened during that visit, he told the agents that SSgt YM slipped off the arm of the chair where he was sitting and hit her mouth on his shoulder. The photos of the injury to SSgt YM's mouth admitted into evidence clearly show an injury to SSgt YM's gums above her teeth. During the pretext phone call, Appellant asked SSgt YM repeatedly not to tell anyone about the night's events.

Factual Sufficiency—Aggravated Sexual Assault

Appellant first argues that the evidence of aggravated sexual assault of SSgt HP was factually insufficient to sustain his conviction. We review issues of factual sufficiency de novo. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to

whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our factual sufficiency determination is limited to a review of the entire record, meaning evidence presented at trial. *Reed*, 54 M.J. at 43; *United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973).

We have reviewed the record of trial and evaluated the arguments by Appellant and the Government. We have weighed the entire record of trial and have made allowances for not having heard and observed the witnesses. Given the totality of the circumstances, and in light of all of the evidence in this case, we are convinced beyond a reasonable doubt of Appellant's guilt of aggravated sexual assault of SSgt HP.

Factual and Legal Sufficiency—

Offenses Relating to SSgt YM

Appellant next asserts that the evidence is factually and legally insufficient to support the convictions of the offenses relating to SSgt YM. Appellant was convicted of four offenses related to SSgt YM. First, he was convicted of making a false official statement to AFOSI concerning the source of SSgt YM's injury to her mouth. Second, he was convicted of abusive sexual contact3 for touching SSgt YM's breast without permission. Third, he was convicted of aggravated sexual contact for causing SSgt YM to touch his chest with her hands and lips by using unlawful force, specifically physical strength sufficient that she could not avoid or escape the sexual contact. Finally, Appellant was convicted of assault consummated by a battery for unlawfully

restraining her by her wrists. Appellant contends that the evidence was legally insufficient as to the abusive sexual contact offense because "there was no evidence elicited at trial that Appellant touched SSgt YM's breast through her clothing." He also asserts that the evidence was factually insufficient with regard to the other offenses "because SSgt YM is not credible and had a motive to fabricate the allegations against Appellant." We apply the same standard with regard to factual sufficiency as articulated above. We review the legally sufficiency of the evidence de novo. *Beatty*, 64 M.J. at 459.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *Turner*, 25 M.J. at 324). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R.1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We find the evidence of abusive sexual contact legally sufficient. Although SSgt YM did express uncertainty about whether Appellant touched her directly or through some article of clothing, her testimony was clear that Appellant touched her breast. While her uncertainty raised an issue about

whether he touched all of her breast directly, or only some part of it, it never contradicted her initial assertion that Appellant touched her breast in some manner. Viewing this testimony in the light most favorable to the prosecution, we conclude that a reasonable finder of fact could have concluded beyond a reasonable doubt that Appellant touched some part of SSgt YM's breast through her clothing. We ourselves, after making allowances for not having seen the testimony, are also convinced beyond a reasonable doubt of Appellant's guilt of abusive sexual contact.

We are similarly convinced of Appellant's guilt beyond a reasonable doubt of the offenses of false official statement and assault consummated by a battery. The injury depicted in the photographs admitted into evidence is completely consistent with SSgt YM's account of Appellant's second visit to her room, and does not support either of the versions Appellant provided to AFOSI during his interview. SSgt YM testified that Appellant grabbed her wrists with unlawful force, and in the course of escaping from his grasp her cell phone struck her mouth and caused the injury to her gums. She also testified that she confronted Appellant, making him aware of the injury. We find that evidence factually sufficient to sustain his convictions.

We are not convinced beyond a reasonable doubt, however, of Appellant's guilt of the charged offense of aggravated sexual contact for causing SSgt YM to touch his chest with her hands and lips by using unlawful force. As alleged in Charge II, Specification 5, the Government was required to prove that Appellant used sufficient strength that SSgt YM could not avoid or escape touching Appellant's chest

with her hands and lips. Several times during her testimony, the prosecution asked SSgt YM to characterize the level of force used by Appellant. In describing the level of force used to cause her to touch his chest, SSgt YM characterized it as a seven on a scale of ten. She also testified that she could not pull her hands away, but we weigh that testimony in conjunction with her behavior that night, including her willingness to let Appellant back into her room after he had departed. When the military judge later asked her how much force Appellant used in grasping her wrists in the context of the battery offense, she characterized the level of force as nine out of ten, but testified that she was able to pull away. In light of her conflicting testimony, we are not convinced beyond a reasonable doubt that Appellant did in fact use such strength that SSgt YM could not have avoided or escaped the contact. Despite determining the evidence was factually insufficient to sustain the charged offense, we may nonetheless affirm so much of the finding that includes a lesser included offense. Article 59(b), UCMJ, 10 U.S.C. § 859(b). We are convinced beyond a reasonable doubt that Appellant caused SSgt YM to touch his chest with her hands and lips without her consent, and accordingly affirm the conviction to the lesser included offense of abusive sexual contact.

Factual and Legal Sufficiency—

2011 False Official Statement

Appellant, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), asserts that the evidence was factually and legally insufficient to sustain his conviction for the false official statement set out in

Charge I, Specification 2. Appellant specifically asserts that the evidence did not prove that he had the intent to deceive in making the statement, and that the evidence that the statement was false was unreliable. We apply the same standard for factual and legal sufficiency as set out above.

The assertion at issue is Appellant's statement that "[he] ran into a coworker [, SSgt BH,] and [he] asked [SSgt BH] to please help [him; SSgt BH] told [Appellant] [SSgt HP] was grown[,] going through a divorce[,] just take her home" or words to that effect. Appellant made this assertion both in his written statement and his verbal statement to AFOSI. The statement was made in the context of multiple assertions to AFOSI that Appellant had no preconceived intent to engage in sexual relations with SSgt HP, SSgt HP initiated the sexual contact, and he reluctantly acceded to her advances.

First, we find that a reasonable fact finder could have found beyond a reasonable doubt that no such verbal exchange took place between Appellant and the coworker, and we ourselves reach that conclusion beyond a reasonable doubt. The coworker testified at trial and unequivocally stated that no such conversation took place. The coworker, who had no apparent bias towards either party, recalled seeing Appellant as he was leaving the club. He testified that, contrary to Appellant's statement to AFOSI, Appellant affirmatively took responsibility for taking SSgt HP home. The coworker also recalled a brief exchange about the fact that SSgt HP's car was parked at the coworker's house, and that Appellant would make sure that she got it the next day. In light of the level of detail of the coworker's testimony and his lack of bias, we find his testimony both legally

and factually sufficient to conclude that the verbal exchange asserted in Appellant's statements did not occur.

Second, since we have no direct evidence of Appellant's intent to deceive, we must determine whether, in light of all the evidence, one could reasonably infer such intent from the surrounding circumstances. The charged statement was completely consistent with Appellant's other assertions that he only reluctantly took SSgt HP home in the first place. While his theme of being a reluctant partner may have been of little relevance to the offense as ultimately charged, our inquiry must focus on his intent at the time of making the statement. Appellant's verbal and written statements contain numerous assertions that SSgt HP initiated the sexual contact that night. In light of his other statements, we are convinced beyond a reasonable doubt that Appellant intended AFOSI to believe that he tried to find an alternative to leaving the club with SSgt HP to corroborate his other statements that he did not initiate the sexual contact that night. We also find the evidence sufficient to allow a reasonable finder of fact to reach that conclusion beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the Government, we find a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. Similarly, having weighed the evidence in the record of trial, making allowances for not having personally observed the witnesses, we ourselves are personally convinced of Appellant's guilt beyond a reasonable doubt.

Reassignment of Defense Paralegal

Appellant's final assignment of error, also submitted pursuant to *Grostefon*, asserts that his substantial rights were prejudiced when SSgt TG, the defense paralegal assigned to assist in his defense, was reassigned to the base legal office that was prosecuting him. In a declaration subject to penalty of perjury, Appellant makes two specific claims: first, that shortly after speaking with Appellant, SSgt TG "was removed [from] his position at the [area defense counsel's office] and began working on the government[']s behalf"; and second, he "believe[d] information stemming from [their] discussions [was] told to the Government to bring about more false and [inaccurate] charges." Appellant alleges the sharing of privileged information constituted prosecutorial misconduct and that "the appearance of transferring SSgt [TG] to the military justice section of the base legal office also raises a legitimate question regarding the fairness of Appellant's trial."

We review arguments of prosecutorial misconduct raised for the first time on appeal for plain error. *See United States v. Akbar*, 74 M.J. 364, 398 (C.A.A.F. 2015) (reviewing for plain error an allegation raised for the first time on appeal that the government's control over the defense counsels' assignments constituted prosecutorial misconduct and unlawful command influence). Appellant must show not only the underlying facts alleged to constitute misconduct, but also that it resulted in some "unfairness in the proceedings." *Id.* at 399. In this case, Appellant makes only the speculative claim that privileged

material was shared.[3] Appellant does not identify any information that came out at trial that he believes was obtained from privileged discussions. In fact, a plain reading of the record indicates that all of the evidence and the identity of witnesses related to the offenses of which he was convicted were disclosed through the course of a routine investigation. Both victims filed complaints with law enforcement independently and cooperated with the investigation. Appellant also made statements to AFOSI. While we are cognizant of the difficulty Appellant faces in proving the content of conversations that may have occurred between SSgt TG and government personnel, we also recognize that one purpose of the plain error rule is to encourage such claims to be raised at trial so that the record can be fully developed. We find that Appellant failed to meet his burden to show any unfairness in the proceeding that resulted from SSgt TG's reassignment, and therefore find no plain error.

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[3] We find that a fact-finding hearing on this issue pursuant to *United States v. DuBay*, 37 C.M.R. 411 (1967) is not necessary or appropriate. "[I]f [an] affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Since Appellant did not specify any information he believed was derived from privileged information, we find his claim to be speculative and conclusory. Although this court granted Appellee's motion to attach affidavits from legal office personnel pertaining to SSgt TG's involvement in the case, we did not consider them in reaching this decision.

Sentence Reassessment

Because we have reduced Appellant's degree of guilt to one of the sexual contact offenses, we must determine whether we can reassess the sentence, or whether we must order a rehearing. This court has "broad discretion" in deciding to reassess a sentence to cure error and in arriving at the reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). To reassess the sentence, we must be able to reliably conclude that, in the absence of error, the sentence "would have been at least of a certain magnitude," and the reassessed sentence must be "no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986). We must be able to determine this to a "degree of certainty." *United States v. Eversole*, 53 M.J. 132, 134 (C.A.A.F. 2000); *see also United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999) (holding we must be able to reach this conclusion "with confidence"). "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *see also United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998) (holding no higher sentence than that which would have been imposed by the trial forum may be affirmed). A reassessed sentence "must be purged of prejudicial error and also must be 'appropriate' for the offense[s] involved" based on our sentence approval obligation under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *Sales*, 22 M.J. at 308.

In determining whether to reassess a sentence or order a rehearing, we consider the totality of the

circumstances, including the following illustrative, but not dispositive, factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct included within the original offenses, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we as appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial by the sentencing authority. *Winckelmann*, 73 M.J. at 15–16.

Our modification of the findings did not substantially change Appellant's culpability in this case. Appellant remains convicted of sexual assault against a fellow Airman, two instances of abusive sexual contact against a second Airman, two false statements to investigators, and a battery that resulted in injury. The sentencing landscape has not changed significantly as a result of our decision, which generally weighs in favor of our ability to reassess the sentence. *See United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003); *Winckelman*, 73 M.J. at 14. The remaining sexual misconduct captures the gravamen of the offenses, and the same conduct would have been before the military judge in sentencing. The offenses are of the type that we have experience and familiarity with as appellate judges, and the sentence was imposed by a military judge rather than a panel. Considering the totality of the circumstances of this case, including the factors enumerated in *Winckelmann*, we are confident we can reassess the sentence.

Based on Appellant's conviction for aggravated sexual contact, as well as the offenses of which Appellant remains guilty, the military judge sentenced Appellant to a dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1. In light of the factors discussed above, we conclude that we can reassess the sentence to the sentence adjudged. We are convinced that the military judge in this case imposed sentence based upon the facts and circumstances of the offenses and not the legal label associated with any one offense. We can confidently and reliably determine that, absent the error, the sentence adjudged by the military judge would have been the same.

Conclusion

We find the conviction for aggravated sexual contact alleged in Specification 5, Charge II, factually insufficient and approve the finding of guilt only of the lesser included offense of abusive sexual contact. We reassess the sentence to the sentence approved by the convening authority. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ. Accordingly, the findings, as modified, and the sentence, as reassessed, are AFFIRMED.

[SEAL] FOR THE COURT

[SIGNATURE]

LEAH M. CALAHAN

Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee
v.
Ian T. Miller,
Appellant

USCA Dkt. No. 16-0641/AR
Crim.App. No. 20150170

ORDER

On further consideration of the granted issues, __ M.J. __ (Daily Journal Nov. 30, 2016), the facts that the United States Army Court of Criminal Appeals issued its judgment in Appellant's case on May 6, 2016, and Appellate Military Judge Larss G. Celtnieks was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 17th day of January, 2017,

ORDERED:

That the order of November 30, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Ian T. Miller, Appellant	USCA Dkt. No. 16-0641/AR Crim.App. No. 20150170

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals and the pleadings, it is, by the Court, this 30th day of November, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER ACCEPTANCE OF APPOINTMENT AS A CMCR JUDGE TERMINATED THE MILITARY COMMISSION OF JUDGE CELTNIEKS.

II. WHETHER, AS AN APPOINTED JUDGE OF THE CMCR, JUDGE CELTNIEKS DID NOT MEET THE UCMJ DEFINITION OF APPELLATE MILITARY JUDGE.

III. WHETHER THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATED THE APPOINTMENTS CLAUSE.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS
Before
TOZZI, CAMPANELLA, and CELTNIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist IAN T. MILLER
United States Army, Appellant

ARMY 20150170
Headquarters, United States Army
Maneuver Center of Excellence
Jeffery R. Nance and Charles A. Kuhfahl, Jr.,
Military Judges
Colonel Charles C. Poche, Staff Judge Advocate
For Appellant: Captain Heather L. Tregle, JA; Captain Michael A. Gold, JA.
For Appellee: Lieutenant Colonel A.G. Courie III, JA.
6 May 2016

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

[SIGNATURE]

MALCOLM H. SQUIRES, JR.

Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee
v.
Joseph D. Morchinek,
Appellant

USCA Dkt. No. 16-0671/AF
Crim.App. No. S32291

ORDER

On further consideration of the granted issue (Daily Journal Oct. 18, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 9, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of October 18, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Joseph D. Morchinek, Appellant	USCA Dkt. No. 16-0671/AF Crim.App. No. S32291

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 18th day of October, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE MARTIN T. MITCHELL IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A SUPERIOR OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSEPH D. MORCHINEK
United States Air Force
ACM S32291

9 May 2016

Sentence adjudged 28 September 2014 by SPCM convened at Bagram Airfield, Afghanistan. Military Judge: Christopher F. Leavey.

Approved Sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $1,021.00 pay per month for 2 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Captain Tyler B. Musselman and Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and ZIMMERMAN
Appellate Military Judges

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

ZIMMERMAN, Judge:

Appellant was convicted, contrary to his plea, by a panel of officer members of misbehavior before the enemy in violation of Article 99, UCMJ, 10 U.S.C. § 899. Appellant was convicted by the military judge, in accordance with his plea, of use, distribution and possession of hashish while receiving special pay in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced him to a bad-conduct discharge, confinement for two months, forfeiture of $1,021 pay per month for two months, reduction to the grade of E-1, and a reprimand.[1] The sentence was approved, as adjudged, on 2 February 2015.

Appellant argues that: (1) the evidence was factually insufficient to establish that Appellant was "before the enemy" and endangered the safety of Bagram Airfield; (2) that the Government was

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[1] The court-martial order incorrectly states that the sentence was adjudged by the military judge, rather than members. We direct the promulgation of a corrected order. We also note that a reprimand was adjudged and approved, but not included on the convening authority's action, as required by Air Force Instruction 51-201, *Administration of Military Justice* (6 June 2013). Since the omission of the reprimand does not prejudice a material right of Appellant, we direct no further action in that regard. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

required to prove that Appellant had a duty to defend Bagram Airfield, and that it failed to do so; (3) the military judge erred in instructing the members prior to deliberation on findings; and (4) the court-martial lacked jurisdiction over the charge of misbehavior before the enemy because it alleged a capital offense yet was referred without consent of the general court-martial convening authority. Finding no error that materially prejudices a substantial right of Appellant, we affirm the findings and sentence.

Background

Appellant used, distributed, and possessed hashish both on and off-duty as a security forces member deployed to Bagram Airfield, Afghanistan. He pled guilty to the controlled substance offenses, but contested the charge that his use constituted misbehavior before the enemy. He argued that under the circumstances, his drug offenses did not endanger the safety of the installation. He further contended that, based upon the state of hostilities, he was not before the enemy at the time of his misconduct. Appellant stipulated that on one occasion he used hashish while posted to a perimeter response team which had immediate-action responsibilities in the event of an attack on the installation. In that capacity, he was the senior member of a three-person crew of a tactical vehicle armed with a crew-served machine gun mounted in a turret. During that time, he both used hashish and distributed it to the other members of his crew. He also stipulated that on another occasion he used hashish while responsible for the search and inspection of personnel coming onto the installation. His commander testified during the trial that both postings were part of a "defense in depth" strategy to

defend the installation. The commander also testified that the installation came under indirect fire attacks during the charged timeframe.

Factual and Legal Sufficiency

Appellant first argues that the evidence was factually insufficient to sustain his conviction for misbehavior before the enemy because the Government failed to prove that his misconduct was actually before the enemy and that it endangered the installation. We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The *Manual for Courts-Martial* provides an explanation for the term "before the enemy."

> Whether a person is "before the enemy" is a question of tactical relation, not distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy

> although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article.

Manual for Courts-Martial, United States, pt. IV, ¶ 23.c.(1)(c) (2012 ed.). Our superior court has also examined the issue, holding that "if an organization is in position ready to participate in either an offensive or defensive battle, and, its weapons are capable of delivering fire on the enemy and in turn are so situated that they are within effective range of the enemy weapons, then that unit is before the enemy." *United States v. Sperland*, 5 C.M.R. 89, 91 (C.M.A. 1952).

Appellant contends that "[n]o evidence was presented that Appellant was tactically engaged with the enemy." Neither *Sperland* nor the definition in the *Manual* focuses on individual engagement, however. The *Manual* references, by way of illustration, those before the enemy as a "member of an antiaircraft gun crew" and "a member of a unit about to move into combat." Since one form of misbehavior before the enemy is wrongful failure to engage in combat, we find this unit-based analysis significant. *See United States v. Payne*, 40 C.M.R. 516, 519–20 (A.B.R. 1969). Appellant's commander affirmatively testified that the unit was tactically engaged in the defense of Bagram Airfield. We find Appellant's contention that Bagram Airfield was "some distance from the front or immediate area of combat" unconvincing in light of the uncontested

evidence in the record that the installation did, in fact, come under indirect-fire attack during the charged time-frame. Nor are we convinced by Appellant's argument that his misconduct did not actually endanger the base. After making allowances for not having personally observed the witnesses, and based upon our independent review of the record, we are convinced beyond a reasonable doubt that Appellant was before the enemy and that his conduct endangered Bagram Airfield.

Appellant separately argues that, although not explicitly stated in the statute, the specification as alleged incorporated as an element that Appellant had a duty to defend Bagram Airfield. More importantly, Appellant argues that the Government failed to prove such an element beyond a reasonable doubt. We construe this assignment of error as an assertion that the evidence was factually and legally insufficient to support his conviction because it did not show that Appellant had a duty to defend Bagram Airfield.

We review legal sufficiency of the evidence de novo. *Washington*, 57 M.J. at 399. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *Turner*, 25 M.J. at 324). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our

assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We review the factual sufficiency component of Appellant's assertion using the same standard of review and legal test articulated above.

Appellant first sets out a statutory and due process argument to establish, as an element, that Appellant had a duty to defend Bagram Airfield. We agree with Appellant's interpretation that the specification alleged in this case established an element that Appellant had a duty to defend Bagram Airfield.

We find, however, that the evidence was factually and legally sufficient to show that Appellant had such a duty. Appellant's commander testified both about the general duty of Airmen assigned to his unit and about the specific duties Appellant performed. He testified that all members of his unit had a duty to defend Bagram Airfield. He also testified about the layered defenses he employed, including searches of incoming and outgoing traffic as well as perimeter response teams with additional weapons. Other members of the unit also testified that Airmen assigned to the unit had a duty to defend Bagram Airfield, even during rest periods, or while "off-shift." Appellant also stipulated that he "was assigned to perform base defense duties." More specifically, Appellant stipulated that he used hashish while on-shift assigned to both search duties and perimeter response team duties. We find this evidence was sufficient when viewed in the light most favorable to the prosecution for a reasonable finder of fact to conclude that Appellant had a duty to defend Bagram Airfield at all times relevant to the charged offense. We ourselves, after making allowances for

not having personally observed the witnesses, and based upon our independent review of the record, also conclude beyond a reasonable doubt that Appellant was guilty of the offense alleged.

Reasonable Doubt Instruction

Appellant also argues that the military judge erred in instructing the members prior to deliberation on findings, particularly as it relates to reasonable doubt. We review de novo the military judge's instructions to ensure that they correctly address the issues raised by the evidence. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). When, as in this case, trial defense counsel made no challenge to the instruction now contested on appeal, the matter has been forfeited absent plain error.[2] *See* Rule for Courts-Martial (R.C.M.) 920(f). If we find error, we must then determine whether the error was harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

The language used by the military judge in Appellant's case is—and has been for many years—an accepted reasonable doubt instruction used in Air Force courts-martial. *See, e.g., United States v. Sanchez*, 50 M.J. 506, 509–10 (A.F. Ct. Crim. App. 1999); *see also United States v. Gibson*, 726 F.2d 869, 873–74 (1st Cir. 1984) (upholding similar language). It was also offered by our superior court as a suggested instruction. *See United States v. Meeks*, 41 M.J. 150, 157–58 n.2 (C.M.A. 1994) (citing Federal Judicial Center, Pattern Criminal Jury Instruction 17–18 (1987)). As such, we cannot say the military

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[2] Although we recognize that the rule speaks of "waiver," this is in fact forfeiture. *United States. v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013).

judge committed error, plain or otherwise, in giving the challenged instruction in Appellant's case.

Jurisdiction over Capital Offense

Appellant raises for the first time on appeal that the convening authority who referred his case to a special court-martial lacked the consent of the general court-martial convening authority, thereby depriving the court of jurisdiction to hear the case. *See* R.C.M. 201(f)(2)(C); *United States v. Henderson*, 59 M.J. 350, 353 (C.A.A.F. 2004). We disagree with Appellant's contention.

"The jurisdiction of a special court-martial over a non-mandatory capital offense is a legal question we review de novo." *Henderson*, 59 M.J. at 351–52.

"Misbehavior before the enemy" under Article 99, UCMJ, is a non-mandatory capital offense, punishable by "[d]eath or such other punishments as a court-martial may direct." *Manual for Courts-Martial, United States*, pt. IV, ¶ 23.e. (2012 ed.). When read together, Article 19, UCMJ, and R.C.M. 201(f)(2)(C)(ii)[3] allow a special court-martial convening authority (SPCMCA) to refer a non-mandatory capital offense to trial by special court-martial, when permitted by "[a]n officer exercising general court-martial jurisdiction over the command which includes the accused." Appellant did not raise this jurisdictional issue at trial, and the record of trial is devoid of any indication that the general court-martial convening authority (GCMCA) granted authority to the convening authority. Hence, the Government filed affidavits in support of its

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[3] Although we recognize that the rule speaks of "waiver," this is in fact forfeiture. *United States. v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013).

argument that the convening authority actually exercised proper jurisdiction under the R.C.M. 201(f)(2)(C)(ii) exception, which affidavits were not contested by Appellant.[4]

The Government supplied an affidavit from the GCMCA and one from the SPCMCA who convened this court-martial. Both affiants unequivocally attested to discussing this case with one another on multiple occasions, and to the GCMCA's granting of approval to the SPCMCA to refer the Article 99 offense to a special court-martial. We find the statements in the affidavits were relevant; the GCMCA granted permission to the convening authority to refer the offenses to trial by a special court-martial; and therefore, the special court-martial had jurisdiction to convict and sentence Appellant.[5]

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[4] The Government filed a motion to attach documents with its response to Appellant's supplemental filings, which motion was uncontested and granted by this court. We considered the affidavits in our review of Appellant's claim of jurisdictional error. *See United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997); *United States v. Averell*, 2014 CCA LEXIS 841 (N.M. Ct. Crim. App. 6 November 2014), *pet. rev. denied*, 74 M.J. 354 (C.A.A.F. 2015) (where appellant did not raise jurisdictional issue at trial and did not dispute contents of post-trial affidavit, court relied on post-trial affidavit to find proper referral of charges to court-martial).

[5] Although neither required by law nor regulation, where the GCMCA permits a non-mandatory capital offense to be referred to a special court-martial, such

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT
[SIGNATURE]
LEAH M. CALAHAN
Clerk of the Court

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approval could be expressly stated on the charge sheet, DD Form 458, Section V.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Kelvin L. O'Shaughnessy, Appellant	USCA Dkt. No. 16-0616/AF Crim.App. No. 38732 ORDER

On further consideration of the granted issue (Daily Journal Nov. 29, 2016), the facts that the United States Air Force Court of Criminal Appeals issued its judgment in Appellant's case on May 5, 2016, and Colonel Martin T. Mitchell was appointed by the President to the United States Court of Military Commission Review on May 25, 2016, and in light of *United States v. Dalmazzi*, __ M.J. __ (C.A.A.F. Dec. 15, 2016), it is, by the Court, this 27th day of December, 2016,

ORDERED:

That the order of November 29, 2016, granting review is hereby vacated, and Appellant's petition for grant of review is denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Kelvin L. O'Shaughnessy, Appellant	USCA Dkt. No. 16-0616/AF Crim.App. No. 38732 ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 29th day of November, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. CMCR JUDGE MITCHELL WAS NOT STATUTORILY AUTHORIZED TO SIT ON THE AIR FORCE COURT OF CRIMINAL APPEALS.

II. EVEN IF CMCR JUDGE MITCHELL WAS STATUTORILY AUTHORIZED TO BE ASSIGNED TO THE AIR FORCE COURT OF CRIMINAL APPEALS, HIS SERVICE ON BOTH COURTS VIOLATED THE APPOINTMENTS CLAUSE GIVEN HIS NEWLY ATTAINED STATUS AS A SUPERIOR OFFICER.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class
KELVIN I. L. O'SHAUGHNESSY
United States Air Force
ACM 38732

5 May 2016

Sentence adjudged 21 August 2014 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Gregory O. Friedland (arraignment) and Vance H. Spath.

Approved Sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Colonel Katherine E. Oler; Captain Tyler B. Musselman; and Gerald R. Bruce, Esquire.

Before

MITCHELL, MAYBERRY, and BROWN

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

MAYBERRY, Judge:

At a general court-martial composed of officer and enlisted members Appellant was convicted, contrary to his pleas, of one charge and one specification each of sexual assault and abusive sexual contact, in violation of Article 120 UCMJ, 10 U.S.C. § 920. Appellant was acquitted of one specification of abusive sexual contact. The court sentenced Appellant to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged but deferred the adjudged forfeitures from 14 days after sentence was announced until action.

On appeal, Appellant contends that the mental health records of RS, Appellate Exhibit VII, are incomplete thereby render the record of trial incomplete. Accordingly, Appellant asserts that he was denied due process under the Fifth Amendment[1] when this court failed to examine the entire record of trial and that he was further denied due process under the Fifth Amendment due to appellate counsel's inability to review the complete mental health records, resulting in counsel's inability to

[1] U.S. CONST. amend. V.

provide effective assistance of counsel. We disagree and affirm the findings and sentence.

Prior to filing his assignment of errors, Appellant moved this court to compel the production of "the entirety of the mental health records for Ms. RS." Appellant asserted that the presence of an arrow in the margins of one page of the records contained in the mental health records "indicates there is more information contained on the back side or additional pages." Appellant's position is that facially it appears the mental health records as provided to the Government, and eventually the military judge, were incomplete. Appellant maintained that the incomplete record prohibited his counsel from determining whether there was some prejudice or harm to Appellant and this court was unable to conduct its review pursuant to Article 66, UCMJ.

This court denied the motion to compel, applying the four-prong standard for post-trial discovery set out in *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). This court held that Appellant had failed to meet his threshold burden of demonstrating some measure of appellate inquiry was warranted in this matter. First, he had not demonstrated that the claimed "additional" records exist. Appellate Exhibit VII was reviewed in camera by the military judge at trial, and later provided to both trial and trial defense counsel. Additionally, their respective expert consultants were authorized to review the documents. RS was interviewed by trial defense counsel and testified in findings and sentencing but there was no showing that trial defense counsel inquired about the handwritten arrow or questioned the completeness of the record at trial. Finally, since Appellant had not filed an assignment of errors at

the time of his motion, he had not provided a sufficient showing of relevance to a claim of error or defense and this court was unable to determine whether there was a reasonable probability that the result of the proceeding would have been different if this information had been disclosed (assuming it exists). Additional facts necessary to resolve this issue are discussed below.

The sole error now claimed by Appellant is that the record of trial is incomplete as a result of the existence of this extraneous mark contained on one page of the sealed mental health records. Appellant's requested relief is that either the conviction be set aside or the bad-conduct discharge be disapproved.

Record of Trial—Is it Complete?

The issues of whether a record of trial is complete and a transcript is verbatim are questions of law that we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014). The lack of a verbatim transcript and an incomplete record are two separate and distinct errors. *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013).

We first address the issue of whether the transcript is verbatim; it is. Article 54(c)(1), UCMJ, 10 U.S.C. § 854(c)(1), requires a "complete" record of the proceedings and testimony to be prepared for any general court-martial resulting in a punitive discharge. A "complete" record must include the exhibits that were received in evidence, along with any appellate exhibits. Rule for Courts-Martial (R.C.M.) 1103(b)(2)(D)(v). The "missing" appellate exhibit page(s) solely raise the issue of whether the record is complete. The threshold question is whether the missing exhibits are substantial, either

qualitatively or quantitatively. *Davenport*, 73 M.J. at 377. Omissions may be quantitatively insubstantial when in light of the entire record the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Where a record is missing an exhibit, this court evaluates whether the omission is substantial. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.* Whether an omission is insubstantial is a "case-by-case," fact based inquiry." *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). If the omission is substantial, thereby raising a presumption of prejudice, the Government may rebut the presumption by reconstructing the missing material. *United States v. Lovely*, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2014).

Based upon the evidence in the record of trial, Appellate Exhibit VII includes every page provided to the military judge for his in camera review. We note that the record of trial is silent as to the number of pages provided to the judge.[2] We also note that the mental health records were not sealed at the time they were provided to the military judge. However,

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[2] The only estimate as to the number of pages is offered by the trial counsel during the closed hearing on the Defense Motion to Compel Mil. R. Evid. 513 records. Trial counsel indicates that the records have been secured, and indicates the number of pages is "bordering [on] maybe 100 or so."

there was no objection or comment of any kind made by any party when this fact was announced in open court by the Special Victim's Counsel (SVC). Additionally, while the trial counsel indicated on the record that they had procured the mental health records, it was the SVC who provided them to the military judge, stating on the record that his client had them in her possession. The military judge took possession of the documents and indicated that he would "identify page numbers later." After his in camera review of the documents, the military judge held that there was nothing material or necessary to the defense and did not provide the records to either party; they remained sealed. The military judge forewarned the SVC that if there was victim impact evidence presented during the sentencing phase, assuming there was a sentencing phase, this issue would likely resurface. The SVC acknowledged that possibility and advised that he had discussed it with his client.

In the sentencing phase of the trial, the SVC requested that RS be allowed to make an unsworn statement. Again, the military judge discussed the possibility of this allowing access by counsel to the mental health records. The record of trial references that over the evening recess, the military judge decided to provide access to the mental health records and sent an email to the parties notifying them of his decision. On the record the next day the military judge states "both sides have a copy."[3] RS

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[3] The record of trial does not contain the email, and the transcript contains no additional explanation as to how the sealed matters were provided to the counsel. We consider this to be analogous to a Rule

provided an unsworn statement to the court. In rebuttal, the defense offered a single page from those records as Defense Exhibit R, without objection from the SVC or the Government. This document was admitted and sealed. The page offered was neither the page containing the arrow, nor the other pages of the mental health records containing information on this same subject matter.[4] The Government did not call RS or offer any surrebuttal.

The record of trial contains no further discussion regarding the content of the mental health records in Appellate Exhibit VII. The Master Index for the record of trial does not indicate the number of pages contained in Appellate Exhibit VII, nor does the cover sheet of the envelope containing the exhibit. The only quantitative description of the records was by the trial counsel, when he opined that they bordered on 100 pages. There are in fact 12 pages. However, in so far as the mental health records were in the possession of the SVC and trial counsel had not seen them, his assessment can best be characterized as an estimate designed to guide the military judge's decision as to how long it would take him to review the material.

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for Courts-Martial 802 session and remind military judges and counsel that such matters should be included in the record orally or in writing.

[4] To avoid unnecessarily disclosing the content of privileged mental health records, this court deliberately confines our description of the narrative on that page to be administrative in nature. Furthermore, the same subject matter is present on two other pages.

Appellate Exhibit VII contains a "Release of Confidential Information Authorization Form" signed by RS on 12 August 2014, authorizing release of the entire contents of her mental health records to her SVC. There is no evidence before us to support that the mental health records provided to the military judge differ in any way from the documents contained in Appellate Exhibit VII. Both Appellant's counsel and this court have access to the entire original record of trial. The record of trial in this case is complete.

Assuming arguendo the presence of an arrow in the margin signifies that additional pages of mental health records exist, this court must determine whether the omission is substantial. *Lovely*, 73 M.J. at 676. These records only affect the sentencing phase of the trial because they only became relevant after RS provided victim impact evidence. Appellant subsequently offered a portion of one page of the records. Having examined the contents of the page with the arrow, even if that arrow refers to additional matters found on the back of the same page or an additional page, we are convinced those matters would be insubstantial with respect to sentencing. We find that if additional records exist related to the subject matter proximate to the arrow, their omission is insubstantial. In this case the omission was insubstantial both qualitatively, because the substance of the omitted testimony presumably relates directly to the subject matter proximate to the arrow, and quantitatively, since the subject matter is addressed in other portions of the mental health records. That information is not relevant to the subject matter of RS's victim impact evidence.

Finally, we reevaluate the propriety of post-trial discovery using the Campbell factors. *Campbell*, 57 M.J. at 138. Our assessment is unchanged regarding the factors that Appellant has not made a colorable showing that the evidence exists or that the evidence, if it exists, was discoverable at the time of trial had the trial defense counsel raised the issue with the military judge, the individual who provided the copies, or RS herself. Given that Appellant has not asserted any error other than the speculation that the record of trial is incomplete, this court finds that any potential additional information is not relevant to an articulated claim or defense and there is no reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

The record of trial is complete. Appellant's counsel had the benefit of reviewing the entire record of trial and was able to provide effective assistance. We are able to conduct a thorough and detailed appellate review of this case and have done so.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT
[SIGNATURE]
LEAH M. CALAHAN

IV. *ORTIZ* (NO. 16-1423): LOWER-COURT ORDERS, OPINIONS, & RELEVANT PLEADINGS

UNITED STATES, Appellee

v.

Keanu D. W. ORTIZ, Airman First Class

U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

Argued February 7, 2017

Decided April 17, 2017

Military Judge: L. Martin Powell

For Appellant: *Major Lauren A. Shure* (argued); *Major Johnathan D. Legg* and *Brian L. Mizer*, Esq. (on brief).

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce*, Esq. (on brief).

Amici Curiae for Appellee: *Colonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, and Major Anne C. Hsieh* (on brief)—*for Army Government Appellate Division. Colonel Valerie C. Danyluk*, USMC, *Lieutenant Commander Justin C. Henderson*, JAGC, USN. *Lieutenant James M. Belforti*, JAGC, USN, *and Brian K. Keller*, Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Philip Sundel*, Esq. (argued); *Brigadier General John G. Baker*, USMC, and *Captain Brent G. Filbert*,

JAGC, USN (on brief) —for Military Commissions Defense Organization.

Judge STUCKY delivered the opinion of the Court, in which Chief Judge ERDMANN, and Judges RYAN, OHLSON, and SPARKS, joined.

Judge STUCKY delivered the opinion of the Court.

While he was serving as a judge on the United States Court of Military Commission Review (USCMCR), under an appointment by the President with the advice and consent of the Senate, Colonel Martin T. Mitchell simultaneously served as an appellate military judge on the panel of the United States Air Force Court of Criminal Appeals (CCA) that reviewed Appellant's case. We granted review of two issues: (1) whether his simultaneous service on the two courts violated the Appointments Clause of the Constitution; and (2) whether he was statutorily barred from sitting on the CCA. We specified an additional issue, asking whether Colonel Mitchell's appointment to the USCMCR made him a principal officer in light of 10 U.S.C. § 949b(4)(C), (D) (2012), which authorize the Secretary of Defense to reassign or withdraw appellate military judges from the USCMCR.

We hold that Appellant is not entitled to relief because the applicable statute, 10 U.S.C. § 973(b) (2012), does not by its terms terminate Colonel Mitchell's position as an appel-late military judge on the CCA, and because, in any event, the statute saves Colonel Mitchell's actions in Appellant's case. We further hold that Colonel Mitchell's status as re-

gards the CCA does not violate the Constitution's Appoint-ments Clause. U.S. Const. art. II, § 2, cl. 2. In light of these holdings, we need not answer the specified issue.

I. Procedural History

A military judge sitting alone convicted Appellant, consistent with his pleas, of knowingly and wrongfully viewing, possessing, and distributing child pornography. Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012). The convening authority approved the adjudged sentence: a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The CCA affirmed in a summary disposition. *United States v. Ortiz*, No. 38839, 2016 CCA LEXIS 337, 2016 WL 3681307 (A.F. Ct. Crim. App. June 1, 2016).

II. Background

> In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was

authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges by ... re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an

> appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate Military Judge of the United States Court of Military Commission Review."

United States v. Dalmazzi, 76 M.J. 1, 2 (C.A.A.F. 2016).

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's case. Unlike in *Dalmazzi*, how-ever, the CCA's opinion in Appellant's case was issued after the President appointed Colonel Mitchell to the USCMCR, and so the issues are not moot. *See* 76 M.J. at 3.

III. Statutory Issue

The first assigned issue is:

> Whether United States Court of Military Commission Review Judge, Martin T. Mitchell, is statutorily authorized to sit as one of the Air Force

Court of Criminal Appeals judges on the panel that decided Appellant's case.

Appellant contends that the position of judge on the USCMCR is a civil office, that by accepting such a position Colonel Mitchell's commission as a regular Air Force officer was terminated as a matter of law, and that the UCMJ does not authorize the Judge Advocates General to assign as judges to the Courts of Criminal Appeals those who have been appointed as judges of the USCMCR.

A regular officer of an armed force on the active duty list may not, "[e]xcept as otherwise authorized by law, ... hold, or exercise the functions of, a civil office in the Government of the United States ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A) (2012).

From its enactment in 1870, the statute provided that "any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby." Act of July 15, 1870, ch. 294, § 18, 16 Stat. 319. *See also* R.S. tit. xiv, ch. 1, § 1222 (2d ed. 1878). That statute was replaced in 1968, with one that stated the "acceptance of such a civil office or the exercise of its functions by such an officer terminated his military appointment." Pub. L. No. 90-235, § 4, 81 Stat. 753, 759 (1968). The statute was substantially amended in 1983. Pub. L. No. 98-94, tit. X, pt. A, § 1002, 97 Stat. 614, 655 (1983). The language automatically terminating the officer's military appointment was repealed and a savings clause was added: "Nothing in this

subsection shall be construed to in-validate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5). However, the fundamental prohibition on the holding of a civil office was retained. 10 U.S.C. § 973(b)(2)(A).

We decide questions of statutory construction de novo. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015). From the earliest times, we have held to the "plain meaning" method of statutory interpretation. Under that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result. *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014); *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012); *United States v. Graham*, 16 M.J. 460, 462–66 (C.M.A. 1983); *United States v. Dickerson*, 6 C.M.A. 438, 449–50,20 C.M.R. 154, 165–66 (1955). The essential question underlying the first assigned issue is whether Judge Mitchell's appointment to the USCMCR terminated his military com-mission and thereby nullified his participation in any case at the CCA. We hold that it did not.

The 1983 amendments to the statute were occasioned by an opinion of the Justice Department's Office of Legal Counsel, which opined that the longstanding practice of appointing military judge advocates as Special Assistant U.S. Attorneys violated § 973.[1]

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[1] The report language on the provision does not go beyond that situation. S. Rep. No. 98-174, at 232–34 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122–24. However, in view of the unambiguous

While there is much that is unsettled about this situation, the aim of the statute is clear. The evil sought to be protected against is the unauthorized holding of civil office by officers of the armed forces on active duty, which is thought to threaten "civilian supremacy in the conduct of governmental affairs." S. Rep. No. 98-174, at 232 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122. Thus, the prohibitions in the statute are aimed at the holding of "civil office" (here, civil office requiring presidential appointment with Senate advice and consent) rather than the performance of assigned military duty. Section 973 might prohibit Judge Mitchell from holding office at the USCMCR—a question that is not before us—but nothing in the text suggests that it prohibits Judge Mitchell from carrying out his assigned military duties at the CCA. The wording of the savings clause at subsection (b)(5), "Nothing in this subsection shall be construed to invalidate any action taken by an officer in furtherance of assigned official duties" comports with this interpretation, and applies by its terms to Judge Mitchell's assigned official duties at the CCA.

Contrary to Appellant's argument, the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination. The language supporting Appellant's argument was expressly repealed over thirty years ago. Accordingly, Judge Mitchell's military commission, and therefore, his service on the CCA, was un-affected by his appointment to the USCMCR.

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nature of the statutory language, resort to legislative history is unnecessary.

IV. APPOINTMENTS CLAUSE

The second assigned issue is as follows:

> Whether Judge Martin T. Mitchell's service on both the Air Force Court of Criminal Appeals and the United States Court of Military Commission Re-view violates the Appointments Clause given his status as a principal officer of the United States Court of Military Commission Review.

The Appointments Clause of the Constitution provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

U.S. Const. art. II, § 2, cl. 2.

Appellant alleges that Congress intended to establish the USCMCR as an independent Article I court and protected its judges from removal other than for cause. He then argues that assigning a principal officer appointed to the USCMCR with advice and consent to a CCA with inferior officers violates the Appointments Clause. This is because mixing principal and inferior officers on a CCA allows the Judge Advocates General to "exercise an indirect veto" over the principal officers on the CCA.

The CCA, according to this argument, can be "packed" by the assignment of military officers and the appointment of a chief judge.[2] Article 66, asserts Appellant, "is being implemented in a way that puts military officers, and by extension the Judge Advocate General, in the position to exercise a formal supervisory authority over the lone principal officer on the CCA."

The problem with this argument is that it presumes that Colonel Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges. That is not the case. One is a principal or an inferior officer by virtue of appointment and exercise of the duties of the office. When Colonel Mitchell sits as a CCA judge, he is no different from any other CCA judge under Article 66. The Judge Advocate General's administrative supervision of the CCA is limited even as to the CCA, *see Edmond v. United States*, 520 U.S. 651, 664 (1997), and has no authority or

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[2] The brief asserts that, unless appointed by the President with advice and consent, CCA judges must be military officers. It cites *United States v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014) for that proposition. That is not what *Janssen* held. The case held that civilians appointed to the CCAs must be appointed in one of the methods set out in the Appointments Clause *for inferior officers*. In the case of the appointment at issue in *Janssen*, there was no statutory authority for such appointment. The lack of such authority was the reason for requiring the default method of presidential appointment with advice and consent to be used.

effect on the judicial or administrative functions of the USCMCR. The scheme devised by Congress and the Executive is not illogical in a situation in which service as a USCMCR judge is perforce a part-time activity. *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016) (stating that the USCMCR "is an unusual court in that its caseload depends on the number of military commission proceedings appealed to it. At any given time, therefore, the Court's judges may have very little to do"). Just as military officers on active du ty hold three- and four-star ranks only while assigned to billets carrying those ranks, *see* 10 U.S.C. § 601 (2012), so Colonel Mitchell and the others similarly placed enjoy the perquisites of office only while exercising the functions of the office. We see no Appointments Clause problem from the point of view of Colonel Mitchell's exercising the functions of an appellate military judge under Article 66.

It is important to note what we need not and do not decide here. First, we decide no statutory issue beyond that set out above. We do not decide whether the USCMCR is a prohibited civil office or whether it is "authorized by law" ac-cording to § 973. On the statutory issue, we simply hold that § 973 does not operate to invalidate the actions military officers appointed to civil office take in furtherance of their military duties or to require the retirement or discharge of these officers. The prohibition in § 973(b)(2)(A)(ii) may in-deed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide.

Second, we decide no issue under the Constitution's Appointments Clause beyond that treated above. We intimate no opinion as to the jurisdiction, functions, or operation of the USCMCR,

or Colonel Mitchell's membership on it. By virtue of his presidential appointment to the USCMCR, Colonel Mitchell may well be a principal officer; certainly, the Executive's response to *al-Nashiri* would seem to indicate an executive intent to treat these appointees as principal officers, but that is a question for another day, as are any Appointments Clause questions pertaining to the USCMCR in its earlier incarnation.

Finally, we need not decide the specified issue, which again goes to Colonel Mitchell's status as a principal officer vel non on the USCMCR.

IV. JUDGMENT

The judgment of the United States Air Force Court of Criminal Appeals is affirmed.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Keanu D.W. Ortiz, Appellant	USCA Dkt. No. 16-0671/AF Crim.App. No. 38839 ORDER AND JUDGMENT

On consideration of the briefs of the parties, the briefs of *amici curiae,* and oral argument, it is, by the Court, this 9th day of February, 2017,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed. The opinion of the Court will be issued on a future date. C.A.A.F. R. 43(b). A petition for reconsideration may be filed no later than 10 days after the date of the issuance of said opinion.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES, Appellee

v.

Keanu D. W. ORTIZ, Airman First Class

U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER

On further consideration of the granted issues in the above-entitled case (Daily Journal, October 27, 2017), it is, by the Court, this 16th day of December, 2016,

ORDERED:

That Issue II is hereby amended as follows:

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A PRINCIPAL OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

That the petition for grant of review is also granted on the following specified issue:

III. WHETHER JUDGE MARTIN T. MITCHELL WAS IN FACT A PRINCIPAL OFFICER FOLLOWING HIS APPOINTMENT BY THE PRESIDENT TO THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW IN LIGHT OF THE PROVISIONS OF 10 U.S.C. § 949b(4)(C) AND (D), AUTHORIZING REASSIGNMENT OR

WITHDRAWAL OF APPELLATE MILITARY JUDGES SO APPOINTED BY THE SECRETARY OF DEFENSE OR HIS DESIGNEE.

That the parties will file contemporaneous briefs and a joint appendix on the granted issues as amended and the specified issue on or before January 24, 2017;

That reply briefs will not be filed; and

That *amicus curiae* briefs under Rule 26(a)(1) will be filed on or before January 24, 2017, and motions for leave to file *amicus curiae* briefs under Rule 26(a)(3) will be filed on or before January 17, 2017. Should said motions be granted, *amicus curiae* briefs under Rule 26(a)(3) will also be filed on or before January 24, 2017

FOR THE COURT

/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Keanu D.W. Ortiz, Appellant	USCA Dkt. No. 16-0671/AF Crim.App. No. 38839 ORDER

On consideration of the petition for grant of review of the decision of the Untied States Air Force Court of Criminal Appeals, it is, by the Court, this 27th day of October, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE, MARTIN T. MITCHELL, IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A SUPERIOR OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

No briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

UNITED STATES AIR FORCE

COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KEANU D.W. ORTIZ

United States Air Force

ACM 38839

1 June 2016

Sentence adjudged 15 April 2015 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and MAYBERRY

Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

PER CURIAM:

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT

LEAH M. CALAHAN

Clerk of the Court

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

United States,

Appellant

v.

Khalid Shaikh Mohammad

Walid Muhammad Salih Mubarek Bin 'Attash

Ramzi Bin al Shibh

Ali Abdul-Aziz Ali AKA Ammar al Baluchi, and

Mustafa Ahmed Adam al Hawsawi,

Appellee

ORDER

MOTION TO DISQUALIFY JUDGES SERVING IN VIOLATION OF 10 U.S.C. § 973(B) AND THE COMMANDER-IN-CHIEF CLAUSE OF THE U.S. CONSTITUTION AND TO ABATE UNTIL A PROPERLY CONSTITUTED COURT IS CONVENED

USCMCR CASE NO. 17-002

June 21, 2017

BEFORE:

BURTON, PRESIDING Judge

HERRING, SILLIMAN Judges

On May 8, 2017, Appellee Mohammad moved this Court to disqualify Presiding Judge Burton and Judge Herring from the panel designated to decide this appeal on the grounds that their service on the U.S. Court of Military Commission Review (USCMCR) is in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. Appellee Mohammad Motion 1, 14. Appellee Mohammad argued their service on the USCMCR violated the Fifth and Eighth Amendments to the U.S. Constitution. Appellee Mohammad Motion 1.[1] Appellee Mohammad moved "to abate these proceedings until a properly constituted Court is convened." *Id.* 1, 14. All co-Appellees joined Appellee Mohammad in this motion. On May 15, 2017, Appellant opposed the motion for disqualification and abatement.

Our Court has previously ruled a USCMCR appellate military judge position is not a "civil office" prohibited under 10 U.S.C. § 973(b). *See Order*

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[1] In addition, Appellee Mohammad contended that Appellee Mohammad's panel was not properly constituted because 10 U.S.C. 950f(a) required a minimum of *three military* appellate judges on a panel. (emphasis added) Appellee Mohammad Motion 9-11. On December 31, 2011, Congress substituted "judges on the Court" for "appellate military judges" in 10 U.S.C. § 950f(a). P.L. 112-81, Div. A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011). The December 31, 2011 statutory substitution resolved this issue, and this issue will not receive additional discussi n in this Order.

United States v. Al-Nashiri, No. 14-001 (USCMCR May 18, 2016) (App. A). USCMCR military appellate judges are "authorized by law" and therefore they are not subject to the civil-office prohibition. *Id.* Our Court has also previously decided that assignment of military appellate judges to the USCMCR does not violate the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. *United States v. Khadr*, No. 13-005 (USCMCR Oct. 17, 2014) (App. B). We revisit those issues in this Order, and we arrive at the same holding.

Facts

The Military Commissions Act of 2009 ("2009 M.C.A."), section 950f(a) states, "*Establishment.*—There is a Court of record to be known as the [USCMCR] . . . . The Court shall consist of one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a). The 2009 M.C.A. provided for two ways to assign or appoint judges to the USCMCR:

> (b) *Judges.* (1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.
>
> (2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.

> (3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

10 U.S.C. § 948j(b) states:

> (b) *Eligibility*. A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title [10 USCS § 826] (article 26 of the Uniform Code of Military Justice) as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

On September 10, 2015, Secretary of Defense Ashton B. Carter appointed Lieutenant Colonel Burton and Colonel Herring, who are judges on the Army Court of Criminal Appeals, to the USCMCR under his authority in 10 U.S.C. § 950f(b)(2). Appellee Mohammad App. Tab 1. On September 23, 2015, they were sworn as USCMCR military appellate judges. Appellee Mohammad Motion 2 n.1 (citing Appellee Mohammad App. Tab. 1).

The Court of Appeals for the District of Columbia Circuit considered an Appointments Clause challenge to the Secretary of Defense's assignment of military judges from their Service Courts of Criminal Appeals to sit as USCMCR judges on Al-Nashiri's panel. *In re Al-Nashiri*, 791 F.3d 71, 84 n.7 (D.C. Cir. 2015) The Court said the President could nominate,

and the Senate could confirm the military judges to be USCMCR judges to "put to rest any Appointments Clause questions regarding the CMCR's military judges." *Id.* at 86.

In response to the *Al-Nashiri* decision, President Obama nominated Lieutenant Colonel Burton and Colonel Herring to the USCMCR, and on March 14, 2016, the Senate received the President's nominations. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). *See also United States v. Ortiz*, 2017 CAAF LEXIS 288 (C.A.A.F. Apr. 17, 2017); *United States v. Dalmazzi*, 76 M.J. 1, 2 (C.A.A.F. 2016). On April 28, 2016, the Senate confirmed them to be judges of the USCMCR. *See id.* (citing 162 Cong. Rec. S2600 (daily ed., Apr. 28, 2016)). On May 25, 2016, President Obama signed their commissions appointing each of them to be "an Appellate Military Judge of the United States Court of Military Commission Review." *See id.*

Discussion

Title 10 U.S.C. § 973 restricts specified officers on active duty from performance of civil functions, and § 973 states:

> (a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.
>
> (b) (1) This subsection applies--
>
> (A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

> ***
>
> (2) (A) *Except as otherwise authorized by law*, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States--
>
> (i) that is an elective office;
>
> (ii) *that requires an appointment by the President by and with the advice and consent of the Senate*; or
>
> (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5 [5 USCS §§ 5312-5317].
>
> (B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that
>
> office or to perform those functions.
>
> * * *
>
> (5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

10 U.S.C. § 973 (emphasis added). In 1975, the Ninth Circuit considered whether a Navy officer's appointment as a California state notary caused him to lose his commission under 10 U.S.C. § 973. *Riddle v. Warner*, 522 F.2d 882 (9th Cir. 1975). In *Riddle*, the court assessed the legislative history of the statute and several opinions of the Attorney General and observed:

> The current version of [10 U.S.C. § 973] had its genesis in an 1870 enactment. *See* Act of July 15, 1870, ch. 294, § 518, 16 Stat. 319. The legislative history is sparse; there appears to be no direct illumination of the problem. A comment by the chairman of the reporting committee, however, shows that a principal concern of the bill's proponents was to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing "paramount" to it. *See* Cong. Globe, 41st Cong. 2d Sess. App. 150 (1870). Early comment on the statute suggests that the Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers. *See, e.g.*, 13 Op. Att'y Gen. 310, 311 (1870) (position of Philadelphia Parks Commissioner determined to be a "civil office"); 15 Op. Att'y Gen. 551, 553 (1876) (position as trustees of the Cincinnati Southern Railway determined to be a "civil office"); 35 Op. Att'y Gen. 187, 190 (1927) (position as head of Louisiana State University determined to be a "civil office").

Id. at 884 (noting state court had determined commission of state notary public was a nullity under state law, and holding 10 U.S.C. § 973 was not

violated because Riddle was already a notary as a Navy Judge Advocate under 10 U.S.C. § 836(a)) (internal footnote omitted).

The term "civil office" in 10 U.S.C. § 973(b) is not defined in the statute; however, it was understood by way of "contrast to the term 'military office.' An 'officer of the Army,' holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other."[2] An appointment statute that includes military "[r]ank, title, pay, and retirement are the indicia of military, not civil, office." *See Smith v. United States*, 26 Ct. Cl. 143, 147 (Ct. Cl. 1891). Presiding Judge Burton and Judge Herring's appointments on the USCMCR meet the Court of Claims tests because officers meeting the military judge requirements of 10 U.S.C. § 836 are all field grade officers, sitting military judges on the Service Courts of Criminal Appeals, and eligible for military retirement upon completion of the requisite number of years of military service. *See* 10 U.S.C. §§ 836, 948j(b), and 950f(b)(2). *See also, e.g., Winchell v. United States*, 28 Ct. Cl. 30, 35 (Ct. Cl. 1892). It does not matter that the President has seen fit to appoint and the Senate confirm civilians to the USCMCR because Congress expressly provided for civilians on the USCMCR under 10 U.S.C. § 950f(b)(3). *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). Congress has established a requirement for military officers to be additionally appointed by the

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[2] *Acceptance of Office in National Guard of a State by Officer on Active List of the Regular Army*, 29 U.S. Op. Att'y. Gen. 298, 299 (1912); 1912 U.S. AG LEXIS 63 at *3.

President and confirmed by the Senate, beyond that included in their promotions to their rank, to certain specified positions, including: the Chairman and Vice Chairman of the Joint Chiefs of Staff, 10 U.S.C. §§ 152, 154; the Chief and Vice Chief of Naval Operations, §§ 5033, 5035; the Commandant and Assistant Commandant of the Marine Corps, §§ 5043, 5044; the Surgeons General of the Army, Navy, and Air Force, §§ 3036, 5137, 8036; the Chief of Naval Personnel, § 5141; the Chief of Chaplains, § 5142; and the Judge Advocates General of the Army, Navy, and Air Force, §§ 3037, 5148, 8037. *See Weiss v. United States*, 510 U.S. 163, 171 (1994).

None of the statutory provisions requiring Presidential appointment and Senate confirmation of commissioned officers to these positions specify the inapplicability of 10 U.S.C. § 973. *See* 10 U.S.C. §§ 152, 154, 3036, 3037, 5033, 5035, 5043, 5044, 5137, 5141, 5142, 5148, 8036, 8037. There have not been any challenges of their appointments under 10 U.S.C. § 973 in the courts. Military commissions are a traditional military function. U.S. military commissions or similar military tribunals have been used to prosecute offenses against the law of war since the Revolutionary War.[3] There were 4,271

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[3] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006); *Ex parte Quirin*, 317 U.S. 1, 31 n. 9 (1942) (indicating in 1780 British Major Andre was tried by a "Board of General Officers" for spying), *see also* George Davis, *A Treatise on the Military Law of the United States* 308 n.1 (rev. 3d ed. 1915) (indicating British Major Andre's tribunal was "in fact a military commission."). *See also United States v. Hamdan*, 801 F. Supp. 2d 1247, 1294-1310 (USCMCR 2011), *rev'd on other grounds*, *Hamdan v. United States*,

documented military commission trials during the Civil War and another 1,435 during Reconstruction.[4] In the wake of World War II, the U.S. military acted as a leading proponent of and participant in thousands of war crimes trials in Germany and the Far East for violations of the law of war.[5]

In *Quirin*, the Supreme Court addressed the authority of the President to try by military commission cases of the Nazi saboteurs captured on U.S. soil and accused of violations of the law of war as follows:

> Congress has explicitly provided, so far as it may constitutionally do so, that

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696 F.3d 1238 (D.C. Cir. 2012) (describing military commissions from the Revolutionary War through the post-World War II trials).

[4] David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 40 n. 223 (2005) (citing Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-73, 176-77 (1991)).

[5] *See* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10*, at 1, 234-35 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf. *See also* International Criminal Court website, Link-Allied Tribunals of the Far East, Link-United States of America, Link-Yokohama Trials, is the Internet location for numerous trials of Japanese war criminals by the Eighth U.S. Army, https://www.legal-tools.org/en/browse/; *In re Yamashita*, 327 U.S. at 1 (1946).

> military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. . . . By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. . . *An important incident to the conduct of war is the adoption of measures by the military command* not only to repel and defeat the enemy, but to seize and *subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.*

Ex parte Quirin, 317 U.S. 1, 28-29 (1942) (emphasis added; internal footnote omitted). The word "military" is used in the 2009 M.C.A. more than 450 times. It is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war. There is no evidence that Congress intended to limit service on the USCMCR to civilians, especially in light of the specific declaration in 10 U.S.C. § 950f(b)(2) that military appellate judges could be appointed to the USCMCR.

The Department of Justice, Office of Legal Counsel observed that the phrase "otherwise authorized by law" in 10 U.S.C. § 973(b) need not be mentioned in the appointment statute to be

effective.[6] The appointment statute does not, for example, need to indicate that the position to which a military officer is appointed in the appointment statute is an exception to the prohibition in 10 U.S.C. § 973.[7] Moreover, § 973's "'otherwise authorized by law' clause also does not list specific statutes authorizing active duty officers to hold particular civilian offices."[8]

In addition, 10 U.S.C. § 950f(b)(2), currently applying to only three military appellate judges assigned to the USCMCR, is more specific than 10 U.S.C. § 973(b)(2)(A)(ii) (currently over 1,000 Presidential appointments with Senate confirmation (PAS)),[9] and 10 U.S.C. § 950f was more recently amended than 10 U.S.C. § 973.[10]

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[6] *See Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 2016 OLC LEXIS 3, *6-*7, *10-*11 (Mar. 24, 2016) (2016 OLC Opinion) (holding military commissioned officers are "authorized by law" to hold civilian offices while on terminal leave even though that "position was covered by [10 U.S.C.] section 973(b)(2)(A).").

[7] *See id.*

[8] *Id.* at *10 (citations omitted).

[9] There are about 1,212 Presidential appointments with Senate confirmation (PAS) and the PAS includes "[c]abinet secretaries and their deputies, the heads of most independent agencies, and ambassadors." Zach Piaker, Center for Presidential Transition, Partnership for Public Service website (Mar. 16, 2016),

Appellee Mohammad explained his argument challenging the appointments of Presiding Judge Burton and Judge Herring as follows:

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http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php. *See* Christopher M. Davis and Michael Greene, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, Congressional Research Service RL30959 (May 3, 2017); Henry B. Hogue and Maeve P. Carey, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, Congressional Research Service R44083 (June 22, 2015) (noting the PAS process involved more than 1,000 in Executive Branch alone). *See also, e.g., United States v. Burns*, 79 U.S. 246, 252 (1871) (concluding the Secretary of War held a "civil office," because the Secretary "is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments."). *See also* 2016 OLC Opinion, *supra* n. 6, at *11-*13 (discussing "rule of relative specificity").

[10] *See* P.L. 112-81, Div A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011) (most recent amendment of 10 U.S.C. § 950f); P.L. 108-136, Div A, Title V, Subtitle D[E], § 545, 117 Stat. 1479 (Nov. 24, 2003) (most recent amendment of 10 U.S.C. § 973). *See also United States v. Estate of Romani*, 523 U.S. 517, 532-33 (1998) (later, more specific statute governs); *Tenn. Gas Pipeline Co. v. FERC*, 626 F.2d 1020, 1022 (D.C. Cir. 1980) (citations omitted).

Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed to the USCMCR under § 950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the "good behavior" tenure of an Article III judge, is irreconcilable with the President's constitutional authority as Commander-in-Chief and therefore cannot stand.

* * *

Even if Congress had contemplated the "appointment" of military officers to the principal office of USCMCR judge – which is inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President's ability to direct and supervise the duties of those in the chain of-command. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015)) ("[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.") (citation omitted); *Relation of the President to the Executive Departments*, 7 U.S. Op. Att'y. Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 ("No act of Congress . . . can . . . authorize or create any military

> officer not subordinate to the President."). Unsurprisingly, there is no precedent for military officers simultaneously serving as principal officers with the attendant tenure protections for the chain-of command. *Orloff v. Willoughby*, 345 U.S. 83,
>
> 94 (1953) (failing to find a single "case where this Court has assumed to revise duty orders as to one lawfully in the service."). It is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members' simultaneous holding of civil offices that could prevent the reassignment by their military chain of command.

Appellee Mohammad Motion 11-14.

The 2009 M.C.A. § 949b(b)(4) provides the reassignment limitations for USCMCR military appellate judges:

> (4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:
>
> (A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

> (B) The appellate military judge retires or otherwise separates from the armed forces.
>
> (C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).
>
> (D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

10 U.S.C. § 949b(b)(4).

The reassignment limitations in 10 U.S.C. § 949b(b)(4) along with other provisions in the 2009 M.C.A. are designed to ensure that the USCMCR is free from improper influence. Congress has an important role in ensuring Appellees' military commission is protected from improper influence, and one way of doing that is to limit reassignment of appellate military judges. Congress's important role is specifically defined in the U.S. Constitution. The

preamble of the Constitution "provides for the common defence." To implement that goal, the Constitution sets forth the powers of Congress as follows:

> [T]he Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. . . . And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

Quirin, 317 U.S. at 26. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring). The USCMCR appellate judges are not the only entity where Congress has addressed assignments and reassignments. Congress has enacted several statutes limiting assignments of military officers. *See, e.g.*, 10 U.S.C. § 154(a)(3) (defining tour length of Vice Chairman of Joint Chiefs of Staff); *id.* at §§ 661, 664, 668 (defining the qualifications, duration, and standards for tours of officers in joint duty assignments); *id.* at § 671 (prohibiting assignment overseas on land before completing entry-level training); *id.* at § 1161 (limiting the President's authority to drop an officer from the rolls for misconduct); *id.* at § 3033 (limiting the time an officer may serve as Chief of Staff of the

Army). *See also, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 532, 540 (1999) (reversing CAAF decision under the All Writs Act to enjoin the President and other officials from dropping Goldsmith from the Air Force rolls under 10 U.S.C. § 1161).

Conclusion

We affirm our previous decision that USCMCR military appellate judicial positions occupied by commissioned officers qualified under 10 U.S.C. §§ 826, 948j(b), and 950f(b)(2) initially assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2), nominated by the President, confirmed by the Senate, and appointed by the President as "an Appellate Military Judge" under 10 U.S.C. § 950f(b)(3) to the USCMCR does not violate the civil office provision in 10 U.S.C. § 973(b). Military commissions are a traditional military function, and Presiding Judge Burton's and Judge Herring's service as military appellate judges is "authorized by law." The limitation on the President's removal or reassignment authority in the 2009 M.C.A. § 949b(b)(4) does not violate the Constitution's Commander-in- Chief Clause. Appellee Mohammad's Motion does not establish disqualification of Presiding Judge Burton and Judge Herring. Accordingly, there is no basis to abate these proceedings.

ORDER

Therefore, it is hereby

ORDERED that Appellee Mohammad's motion does not establish a basis to disqualify Presiding Judge Burton and Judge Herring, and his motion to disqualify them is DENIED. It is further

ORDERED that Appellee Mohammad's motion does not establish a basis to require three military appellate judges to be assigned to Appellee's panel, and his motion to require three military appellate judges to be assigned to his panel is DENIED. It is further

ORDERED that Appellee Mohammad's motion that this Court declare the limitation in the 2009 M.C.A. § 949b(b)(4) on the President's authority to reassign appellate military judges to be a violation of the Constitution's Commander-in-Chief clause is DENIED. It is further

ORDERED that Appellee Mohammad's motion to abate his appeal is DENIED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[APPENDICES OMITTED]

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,

Appellant

v.

ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,

Appellee

ORDER

LIFTING STAY

AFFIRMING PRIOR ORDERS

DENYING DISQUALIFICATION AND RECUSAL MOTIONS

SETTING ORAL ARGUMENT

CMCR CASE NO. 14-001

May 18, 2016

BEFORE:

MITCHELL, PRESIDING Judge

KING, SILLIMAN Judges

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee' s mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri,* 791 F .3d 71 (D .C. Cir. 2015); Order, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presidential nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri,* 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our

court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016, 2 and they were sworn as USCMCR judges on May 2, 2016.[2]

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant's motion for leave to file an outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel, alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

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[1] *See* 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

[2] U.S. Cong., Nominations of 114th Cong., PN 1219, https://www.congress.gov/nomination/114th-congress/1219 (Judge Mitchell), and PN 1224, https://www.congress.gov/nomination/114thcongress/1224 (Judge King). (Encl. I, 2)

On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion, and we approved the extension request.

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra*.

---

[3] The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the "Air Force nomination of Martin T. Mitchell, to be colonel" and "Navy nomination to Donald C. King, to be Captain." It mirrors the closing phrase of PN 1219 and 1224.

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military

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[4] Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non–military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or

Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is GRANTED.

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is GRANTED.

ORDERED that orders our Court previously decided are AFFIRMED.

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is DENIED.

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possession, State, county, municipality, or official subdivision thereof. This term does not include a non elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is DENIED.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,

Appellant

v.

ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,

Appellee

ORDER

CMCR CASE NO. 14-001

May 2, 2016

BEFORE:

MITCHELL, PRESIDING Judge

KING, SILLIMAN Judges

On June 26, 2015, appellant filed an unopposed motion moving "the Court to stay the proceedings while it explores options for re-nomination and reconfirmation of the military judges as U.S.C.M.C.R. judges." Appellant explained that the stay sought is for all litigation on the two government appeals filed with our Court. Appellee did not object to the suspension of proceedings.

By a series of orders, our Court ordered the continued suspension of the hearing schedule and oral argument. The President nominated, and on

March 14, 2016, the Senate confirmed Judges Mitchell and King. On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders and decisions. On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion.

Therefore, it is hereby

ORDERED that the suspension of the briefing schedule and oral argument is continued in this case. Appellee's motion to delay responding to appellant's April 29, 2016 motion until May 16, 2016 is GRANTED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

Copy to:

Convening Authority, OMC

Judges Listed

Appellate Counsels

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, Paulette V. Burton, having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

2 May 2016	[SIGNATURE]
Date	(Name of Judge)

[SIGNATURE]
Signature of Official Administering Oath

10 USC 936 [sic]
Authority to Administer Oath

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Lieutenant Colonel Paulette V. Burton, United States Army, I have nominated, and, by and with the advice and consent of the Senate, do appoint her to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower her to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Lieutenant Colonel Paulette V. Burton, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, Larss Gunars Celtnieks, having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

2 May 2016
Date

[SIGNATURE]
LARSS G. CELTNIEKS

[SIGNATURE]
Signature of Official Administering Oath

10 U.S.C. § 936
Authority to Administer Oath

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Colonel Larss Gunars Celtnieks, United States Army, I have nominated, and, by and with the advice and consent of the Senate, do appoint him to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower him to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Colonel Larss Gunars Celtnieks, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, James W. Herring, Jr., having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

2 May 2016	[SIGNATURE]
Date	(Name of Judge)

[SIGNATURE]
Signature of Official Administering Oath

10 USC 936 [sic]
Authority to Administer Oath

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Colonel James W. Herring, United States Army, I have nominated, and, by and with the advice and consent of the Senate, do appoint him to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower him to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Colonel James W. Herring, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]

JUDICIAL OATH OF OFFICE
APPELLATE JUDGE

I, Martin T. Mitchell, having been duly appointed as Appellate Judge of the United States Court of Military Commission Review, do solemnly swear that I will support the Constitution of the United States, and that I will faithfully and impartially perform, according to my conscience and the laws and regulations applicable to trials by Military Commission, all the duties incumbent upon me as Appellate Judge, so help me God.

2 May 2016 — [SIGNATURE]
Date — (Signature of Judge)

[SIGNATURE]
Signature of Official Administering Oath

TSgt Leah Calahan, USAF
Clerk of Court

Authority to Administer Oath
[SEAL]

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Colonel Martin T. Mitchell, United States Air Force, I have nominated, and, by and with the advice and consent of the Senate, do appoint him to by an Appellate Military Judge of the United States Court of Military Commission Review, and do authorize and empower him to execute and fulfill the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Colonel Martin T. Mitchell, during the pleasure of the President of the United States for the time being.

In testimony whereof, I have caused these Letters to be made Patent, and the Seal of the Department of Defense to be hereunto affixed.

Done at the City of Washington this twenty-fifth day of May in the year of our Lord two thousand sixteen and of the Independence of the United States of America the two hundred and fortieth.

[DEPARTMENT OF DEFENSE SEAL]

By the President: *Barack Obama* [signature]

Secretary of Defense: *Ash Carter* [signature]

RECORD AND BRIEFS.

Supreme Court, U.S.
FILED
NOV - 7 2017
OFFICE OF THE CLERK

Nos. 16-961, 16-1017, and 16-1423

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI, *Petitioner*,

v.

UNITED STATES, *Respondent*.

LAITH G. COX, *ET AL.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

KEANU D.W. ORTIZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF FOR THE PETITIONERS

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November 7, 2017

ℓ Bureau of Corporations

QUESTIONS PRESENTED

Federal law requires specific authorization from Congress before active-duty military officers may hold a "civil office" that requires "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii). After President Obama nominated and the Senate confirmed five such officers to serve as "additional judges" of the U.S. Court of Military Commission Review (CMCR), four continued to serve as judges on either the Army or Air Force Court of Criminal Appeals (CCA), including on panels that ruled on some aspect of each of the Petitioners' court-martial appeals.

In Nos. 16-961 and 16-1017, the U.S. Court of Appeals for the Armed Forces (CAAF) dismissed Petitioners' statutory and constitutional objections to the four judges' continued CCA service as moot. In No. 16-1423, CAAF rejected the constitutional challenge and held that, even if the statutory claim had merit, it would only affect the judges' CMCR appointments, not their ability to sit on the CCAs.

The Questions Presented are:

1. Whether this Court has jurisdiction in Nos. 16-961 and 16-1017 under 28 U.S.C. § 1259(3).

2. Whether CAAF erred in Nos. 16-961 and 16-1017 in holding that Petitioners' claims were moot.

3. Whether the four judges' CMCR appointments violated § 973(b)(2)(A)(ii), thereby disqualifying them from continuing to serve on the CCAs.

4. Whether the Appointments Clause prohibits a judge from simultaneously serving on both the CMCR and the CCAs.

PARTIES TO THE PROCEEDING

In *Dalmazzi* (No. 16-961), the Petitioner is Nicole A. Dalmazzi. The Respondent is the United States.

In *Cox* (No. 16-1017), the Petitioners are Laith G. Cox, Courtney A. Craig, Andre K. Lewis, Ian T. Miller, Joseph D. Morchinek, and Kelvin I.L. O'Shaughnessy. The Respondent is the United States.

In *Ortiz* (No. 16-1423), the Petitioner is Keanu D.W. Ortiz. The Respondent is the United States.

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INTRODUCTION

This case arises from the appointment of active-duty military officers already serving on the Army or Air Force Courts of Criminal Appeals (CCAs) to also serve on the U.S. Court of Military Commission Review (CMCR), an Article I court of record created to hear appeals from the Guantánamo military commissions. The three petitions consolidate claims of eight servicemembers, each of whom was convicted by a court-martial and had some aspect of their appeal ruled upon by a CCA panel that included at least one of the four judges whose dual officeholding is at issue.[1]

Since 1870, Congress has generally prohibited active-duty military officers from also assuming a second, non-military office within the government. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. Among other things, this "dual-officeholding ban" today bars military officers, absent specific congressional authorization, from holding a "civil office" that requires presidential nomination and Senate confirmation. *See* 10 U.S.C. § 973(b)(2)(A)(ii).

The sweeping text of § 973(b)(2)(A) "assure[s] civilian preeminence in government" by "prevent[ing] the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975). In so providing, it "embodies an important policy designed to maintain civilian control of the Government." *Memorandum for the General Counsel, Gen. Servs. Admin.*, 3 Op. O.L.C. 148, 150 (1979) [hereinafter "Harmon Memo"].

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1. Similar questions are pending in *Abdirahman* v. *United States*, No. 17-243, and *Alexander* v. *United States*, No. 16-9536.

As the Office of Legal Counsel has explained, when § 973(b)(2)(A) was enacted, it was intended "to bar the appointment of regular military officers to *any* appointive positions in the civil government, irrespective of the importance of the office, the permanence of the appointment, or the likelihood of interference with the officer's military duties." U.S. Dep't of Justice, Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 15 (1983) [hereinafter "Olson Memo"].[2] Otherwise, "allowing active duty regular military officers to hold civil office [would be] 'in conflict with the fundamental principle of republican institutions.'" *Id.* at 11 (quoting Cong. Globe, 41st Cong., 2d Sess. app. 3403 (May 12, 1870) (statement of Sen. Sumner)).

And although Congress has carved out a handful of exceptions to the dual-officeholding ban in the ensuing years, § 973(b)(2)(A) otherwise continues to "prohibit continuation of [an offending officer's] military status . . . upon appointment to a covered position." *Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 Op. O.L.C. 1, 3 (2016) [hereinafter "Thompson Memo"] (internal quotation marks omitted). Thus, along with the threshold justiciability questions raised in *Dalmazzi* (No. 16-961) and *Cox* (No. 16-1017), the core substantive issue in all three petitions is whether the President's appointments of military officers to the CMCR violated the dual-officeholding ban—and, if so, what consequences follow.

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2. An electronic copy of the Olson Memo is available at https://www.justice.gov/olc/page/file/965131/download.

OPINIONS BELOW

In *Dalmazzi* (No. 16-961), CAAF's opinion is reported at 76 M.J. 1 (C.A.A.F. 2016) (per curiam), and appears at J.A. 5–10. The opinion of the Air Force CCA, which is not reported, is reprinted *id.* at 18–25.

The petition in *Cox* (No. 16-1017) consolidates six cases with materially similar facts to *Dalmazzi*. Three of CAAF's dispositive orders are reported at 76 M.J. 54 (C.A.A.F. 2016) (mem.); the other three are reported at 76 M.J. 64 (C.A.A.F. 2017) (mem.). The orders are reprinted at J.A. 26, 38, 43, 100, 105, and 119. The opinions of the Air Force and Army CCAs in these cases, which are not reported, are reprinted *id.* at 29–37, 41–42, 73–99, 103–04, 108–18, and 122–31.

In *Ortiz* (No. 16-1423), CAAF's opinion is reported at 76 M.J. 189 (C.A.A.F. 2017), and appears at J.A. 132–43. The opinion of the Air Force CCA, which is not reported, is reprinted *id.* at 149–50.

JURISDICTION

In *Dalmazzi*, CAAF granted Petitioner's petition for review on August 18, 2016, *id.* at 14, and issued a final decision on December 15, 2016. *Id.* at 5–10. In each of the six cases consolidated in *Cox*, CAAF granted petitions for review on different dates. *See id.* at 27, 39–40, 44, 101–02, 106–07, and 120–21. CAAF issued a final judgment in three of those cases on December 27, 2016, *see id.* at 43, 105, and 119, and in the others on January 17, 2017. *See id.* at 26, 38, and 100. This Court has jurisdiction over all seven cases under 28 U.S.C. § 1259(3).[3]

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3. *See* pp. 23–27, *infra* (discussing this Court's jurisdiction in *Dalmazzi* and *Cox*).

In *Ortiz*, CAAF granted Petitioner's petition for review on October 27, 2016, J.A. 147–48, issued an order and judgment on February 9, 2017, *id.* at 144, and issued an opinion on April 17, 2017. *Id.* at 132–43. On April 26, 2017, the Chief Justice granted Petitioner's application to extend the time within which to file a petition for certiorari until June 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the Appendix to this brief. *See* App., *infra*, 1a–14a.

STATEMENT OF THE CASE

1. The Dual-Officeholding Ban

As originally enacted, § 973(b)(2)(A) provided that:

> [I]t shall not be lawful for any officer of the army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.

Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. This dual-officeholding ban "reflected the hostility toward the military establishment which pervaded the Forty-First Congress." Olson Memo at 9. The sponsor—House Military Affairs Committee Chairman John Alexander Logan—was concerned that "the detailing of military officers to fill civil positions will . . . soon, by precedent, establish the rule that all Army officers may be detailed to fill civil

positions." Hence, Representative Logan warned, "the military will grow to be paramount to the civil, instead of the civil being paramount to the military." Cong. Globe, 41st Cong., 2d Sess. app. 150 (Mar. 10, 1870).

The bill provoked significant debate in Congress—but only with respect to whether, as the original draft had provided, it should also apply to *retired* Army officers. Although that language was excised, there was otherwise widespread agreement that the legislation should and would "create an absolute bar to a military officer's holding *any* appointive or elective office in the civil government." Olson Memo at 10. As OLC has explained, the text and the legislative history "contain[] no suggestion that there should be any distinctions drawn among categories of civil office for which military officers would thenceforth be ineligible." *Id.* at 15–16 (quoting Cong. Globe, 41st Cong. 2d Sess. app. 3321 (May 10, 1870) (remarks of Sen. Wilson)).

Congress left the statute materially unchanged until 1956, when it added the "[e]xcept as otherwise provided by law" proviso to reflect the fact that "other laws enacted after the date of enactment of [the dual-officeholding ban] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). In 1968, Congress extended the ban to apply to all federal military "officer[s] on the active list." Pub. L. No. 90-235, § 4(a)(5)(A), 81 Stat. 753, 759. *See generally* Olson Memo at 17 n.22 (summarizing revisions).

In 1983, OLC concluded that § 973(b)(2)(A) prohibited the longstanding practice of detailing lawyers in the Judge Advocate General's (JAG) Corps as "Special Assistant U.S. Attorneys" to prosecute

petty civilian offenses committed on military installations. *See* Olson Memo at 30–31. Given how widespread that practice had become,[4] OLC also recommended "legislation to permit regular officers to continue to serve in this capacity," *id.* at 32, which Congress enacted four months later. *See* FY1984 Department of Defense Authorization Act, Pub. L. No. 98-94, § 1002, 97 Stat. 614, 655–56 (1983).

As amended, § 973(b)(2) provides:

> (A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—
>
> (i) that is an elective office;
>
> (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or
>
> (iii) that is a position in the Executive Schedule under [5 U.S.C. §§ 5312–17].
>
> (B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.[5]

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4. In 1982 alone, JAG lawyers serving as Special Assistant U.S. Attorneys prosecuted over 70,000 petty offenses committed on military installations. S. REP. NO. 98-174, at 232 (1983).

5. A cognate provision likewise provides that active-duty officers "may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State)." 10 U.S.C. § 973(b)(3).

Among other things, the 1983 amendments sought to allow military officers to exercise the duties of civil offices when lawfully *assigned* to do so—while eliminating any consequences for those, like the JAG lawyers, who had previously done so. *See* H.R. CONF. REP. NO. 98-352, at 233 (1983) ("The clarification was necessary to permit military personnel *assigned* to [JAG] Corps duties to continue assisting attorneys in the Department of Justice with cases related to military installations and other military matters." (emphasis added)). Congress therefore codified two forward-looking and two backward-looking reforms:

1. It narrowed the dual-officeholding ban to apply only to those "civil offices" that also (i) are elective; (ii) require presidential nomination and Senate confirmation; or (iii) are listed in 5 U.S.C. §§ 5312–17. 10 U.S.C. § 973(b)(2)(A).[6]

2. It authorized military officers to be *assigned* or *detailed* to civil offices. *Id.* § 973(b)(2)(B).[7]

3. It eliminated the language providing that "[t]he acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment." *See id.* § 973(b) (1982).

4. It added what CAAF described in *Ortiz* as a "savings clause," J.A. 137: "Nothing in this

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6. All undated U.S. Code citations are to the current edition.

7. Congress went even further in the FY1987 Department of Defense Authorization Act by directly incorporating into Article 6 of the Uniform Code of Military Justice (UCMJ) authorization for JAG lawyers assigned or detailed to a civil office to "perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases." Pub. L. No. 99-661, § 807(a), 100 Stat. 3816, 3909 (1986) (codified at 10 U.S.C. § 806(d)(1)).

> subsection shall be construed to invalidate any action undertaken by an officer in furtherance of *assigned* official duties." 10 U.S.C. § 973(b)(5) (emphasis added).

Because the deletion of the termination provision was meant to be backward-looking, § 973(b)(2)(A) continues to "prohibit continuation of military status . . . upon [unauthorized] appointment to a covered position." Thompson Memo at 3 (internal quotation marks omitted); *see also id.* ("The Department of Defense ('DoD') holds [this] view.").

To that end, DoD's own regulations provide for the offending officer's separation from the military, whether through "retirement (if eligible), discharge, or release from active duty," or "involuntary discharge or release from active duty." Political Activities by Members of the Armed Forces, DoD Directive 1344.10, §§ 4.6.1 to 4.6.2, at 9 (Feb. 19, 2008);[8] Dep't of Def., Standards of Conduct Off., Advisory No. 02-21, *What Constitutes Holding a "Civil Office" by Military Personnel* (Dec. 16, 2002) [hereinafter "SoCo Advisory 02-21"] ("The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office.").[9]

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8. The directive recognizes eight exceptions to the default termination rule—generally covering circumstances in which the officer in question is serving in a forward combat area, is subject to an ongoing administrative or criminal investigation, or is indebted to the United States. *See* DoD Directive 1344.10, §§ 4.6.1.1–4.6.1.8, at 9. The government has never suggested that these exceptions are relevant to this litigation.

9. The directive and the SoCo Advisory are reprinted in the Appendix to this brief. *See* App., *infra*, 15a–23a.

2. The Court of Military Commission Review

Congress authorized the creation of the CMCR in the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, enacted in response to *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006). Although the D.C. Circuit had direct appellate jurisdiction over certain military commission proceedings,[10] the MCA directed the Secretary of Defense to establish the CMCR as an intermediate appellate tribunal between the Guantánamo commissions and the D.C. Circuit, 10 U.S.C. § 950f(a) (2006), just as CCAs sit between courts-martial and CAAF.

The CMCR was not just meant to play a similar hierarchical role as the CCAs; it was expressly modeled on them. *See In re al-Nashiri* (*"al-Nashiri II"*), 835 F.3d 110, 122 (D.C. Cir. 2016), *cert. denied*, No. 16-8966, 2017 WL 1710409 (U.S. Oct. 16, 2017). As one example, it was to be staffed by judges assigned by the Secretary of Defense, who could be military officers or civilians. 10 U.S.C. § 950f(b) (2006); *cf. id.* § 866(a) (authorizing "[e]ach Judge Advocate General" to establish the CCAs and assign judges thereto).

When Congress revised the MCA in 2009, Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2603, a number of the reforms were directed toward bolstering the independence of the

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10. In the Detainee Treatment Act of 2005, Congress had for the first time conferred appellate jurisdiction over a military commission—although the scope of the D.C. Circuit's review under the Act was quite narrow. *See* Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2680, 2743; *cf. Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864) (holding that Congress had not conferred appellate jurisdiction over military commissions).

CMCR vis-à-vis the Executive Branch.[11] The 2009 Act therefore moved away from the CCA model in numerous, intentional respects, including the reconstitution of the CMCR as an Article I "court of record." 10 U.S.C. § 950f(a).

The 2009 Act also bifurcated the means by which judges could be placed on the CMCR, in effect creating two types of CMCR judges: (1) The Secretary of Defense may "assign" individuals who are already "appellate military judges" (and commissioned military officers) to the CMCR, *see id.* § 950f(b)(2); and (2) the President may, by and with the advice and consent of the Senate, "appoint . . . additional judges" to the CMCR. *Id.* § 950f(b)(3). As to the former category of judges—those assigned to the CMCR by the Secretary of Defense—the 2009 Act also conferred a degree of statutory tenure protection by prohibiting the Secretary from "reassigning" or "withdrawing" them from the CMCR except in four prescribed circumstances. *See id.* § 949b(b)(4).

3. *al-Nashiri I* and the CMCR Appointments

The CMCR appointments at issue here came in direct response to *In re al-Nashiri* ("*al-Nashiri I*"), 791 F.3d 71 (D.C. Cir. 2015). In that case, a military commission defendant sought a writ of mandamus to disqualify two military-officer CMCR judges hearing an interlocutory appeal by the government. In particular, Al-Nashiri argued that CMCR judges are principal Executive Branch officers; that, as such,

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11. The CMCR's own website proclaims that "the 2009 MCA is more protective of the independence of appellate judges than the Uniform Code of Military Justice." Off. of Mil. Comm'ns, U.S. Court of Military Commission Review (USCMCR) History (n.d.), http://www.mc.mil/ABOUTUS/USCMCRHistory.aspx.

they require presidential nomination and Senate confirmation; and that the Secretary's *assignment* of military officers to serve as CMCR judges was therefore unconstitutional.

The D.C. Circuit denied the writ, holding that Al-Nashiri could not demonstrate the "clear and indisputable right to relief" necessary to support mandamus. *al-Nashiri I*, 791 F.3d at 85–86. The court nevertheless went out of its way to encourage the political branches to moot Al-Nashiri's constitutional objection ("another reason to pump our judicial brakes," *id.* at 86) by having the President and the Senate formally appoint the CMCR's previously "assigned" judges pursuant to § 950f(b)(3):

> [T]he President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR's military judges. They could do so by re-nominating and re-confirming the military judges to be *CMCR judges*. Taking these steps—whether or not they are constitutionally required—would answer any Appointments Clause challenge to the CMCR.

Id.

"The President chose to take that tack." *al-Nashiri II*, 835 F.3d at 116. Thus, in March 2016, President Obama formally nominated five military officers—Army Lieutenant Colonel Paulette Vance Burton, Army Colonel Larss G. Celtnieks, Army Colonel James Wilson Herring, Jr., Navy Captain Donald C. King, and Air Force Colonel Martin T. Mitchell—to serve as appointed CMCR judges under 10 U.S.C. § 950f(b)(3). *See* 126 CONG. REC. S1474 (daily ed., Mar. 14, 2016). On April 28, 2016, the Senate confirmed the

nominees. *Id.* S2599–600 (daily ed., Apr. 28, 2016). And on May 2, the judges took the oath of office as "additional judges" of the CMCR. J.A. 179, 181, 183, and 185. Although, for reasons that remain unclear, President Obama did not sign the judges' commissions until May 25, 2016, *id.* at 180, 182, 184, and 186, collateral challenges to four[12] of the five judges' continuing CCA service immediately ensued,[13] beginning with *Dalmazzi*.

4. *Dalmazzi* v. *United States* (No. 16-961)

Petitioner Nicole A. Dalmazzi is a Second Lieutenant in the Air Force who was convicted of wrongfully using a controlled substance and was sentenced to one month of confinement and dismissal from the Air Force. On May 12, 2016, a three-judge CCA panel that included Judge Mitchell affirmed her conviction. *See* J.A. 18–25. On May 27, 2016 (two days after President Obama signed Judge Mitchell's CMCR commission), Dalmazzi moved for reconsideration before her Air Force CCA panel (including Judge Mitchell), arguing that Judge Mitchell's appointment

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12. Captain King was reassigned from the Navy-Marine Corps CCA shortly after his CMCR confirmation—and appears to have issued no CCA rulings provoking the questions presented here.

13. These issues have also arisen directly in the CMCR, which has now considered the question twice. In *United States* v. *Al-Nashiri*, a panel that included Judge Mitchell tersely held that CMCR judges do not hold a "civil office" because they exercise a "classic military function." J.A. 173. And in *United States* v. *Mohammad*, a panel that included Judges Burton and Herring reaffirmed *Al-Nashiri* and also concluded that Congress in any event authorized the appointment of military officers to the CMCR. *Id.* at 149–67. A petition for a writ of mandamus in that case is currently pending. *In re Mohammad*, No. 17-1179 (D.C. Cir. filed July 21, 2017).

to the CMCR violated § 973(b)(2)(A)—and that, if it did not, his continuing service on both courts violated the Appointments Clause. She renewed those arguments in her petition for review before CAAF, which was granted on August 18, 2016. *Id.* at 14–15.[14]

After full briefing and oral argument, CAAF issued an opinion holding that her objections were moot because President Obama did not formally sign Judge Mitchell's CMCR commission until May 25, 2016—13 days after the Air Force CCA decision in her case. *See id.* at 10 ("As Colonel Mitchell had not yet been appointed a judge of the USCMCR at the time the judgment in Appellant's case was released, the case is moot as to these issues."). Dalmazzi timely petitioned for certiorari.

5. *Cox et al.* v. *United States* (No. 16-1017)

The Petition in No. 16-1017 consolidates six cases raising facts materially similar to those presented in *Dalmazzi*. Petitioner Laith G. Cox is a Captain in the U.S. Army who was convicted of a number of serious sexual misconduct offenses and was sentenced to 40 years' confinement and dismissal. On April 29, 2016, an Army CCA panel that included Judges Burton and Herring affirmed his conviction in part and his

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14. CAAF treats the 60-day time limit within which to file a petition for review, *see* 10 U.S.C. § 867(b), as jurisdictional. *United States* v. *Rodriguez*, 67 M.J. 110, 116 (C.A.A.F. 2009); *see also id.* at 116 n.10 (explaining why CAAF's approach differs from civilian criminal appeals). After waiting over six weeks for the Air Force CCA to rule on her motion for reconsideration, Petitioner petitioned CAAF for review on July 11, 2016, in order to satisfy § 867(b). The Air Force CCA subsequently concluded that the CAAF petition deprived it of jurisdiction, and dismissed the motion on July 18, 2016. J.A. 16 (citing *United States* v. *Riley*, 58 M.J. 305, 310 n.3 (C.A.A.F. 2003)).

sentence. *See* J.A. 29–37. CAAF granted Cox's petition for review on the same issues as those presented in *Dalmazzi*—and then, after *Dalmazzi*, vacated the grant and denied relief. *See id.* at 26. Cox (and the other five petitioners whose cases were consolidated in No. 16-1017) timely petitioned for certiorari.

Petitioner Courtney A. Craig is a Specialist in the U.S. Army who was convicted of attempted indecent visual recording and was sentenced to a reduction in grade, 20 days' confinement, and a bad-conduct discharge. On May 10, 2016, an Army CCA panel that included Judges Herring and Burton affirmed. *Id.* at 41–42. CAAF granted Craig's petition for review—and then, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 38.

Petitioner Andre K. Lewis is a Staff Sergeant in the U.S. Air Force who was convicted of making false official statements, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and assault consummated by a battery. He was sentenced to a dishonorable discharge, confinement for six years, a reduction in grade, and forfeiture of all pay and allowances. On March 29, 2016, a three-judge Air Force CCA panel modified the findings of guilt but affirmed the sentence. *Id.* at 73–99. Lewis's first motion for reconsideration was assigned to a "special panel" that included Judge Mitchell, and was denied on May 17, 2016. *Id.* at 68–70. On May 30, 2016, Lewis again moved for reconsideration, this time on the ground that Judge Mitchell's appointment to the CMCR had disqualified him from continuing to serve on the CCA. The Air Force CCA seems not to have ruled on that motion. CAAF subsequently granted Lewis's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 43.

Petitioner Ian T. Miller is a Specialist in the U.S. Army who was convicted of two specifications of sexual assault of a child and was sentenced to a reduction in grade, 20 months' confinement, and a bad-conduct discharge. On May 6, 2016, an Army CCA panel that included Judge Celtnieks affirmed. *Id.* at 103–04. CAAF granted Miller's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 100.

Petitioner Joseph D. Morchinek is a Senior Airman in the U.S. Air Force who was convicted of misbehavior before the enemy and a minor drug offense, and was sentenced to a bad-conduct discharge, confinement for two months, forfeiture of $1,021 pay per month for two months, a reduction in grade, and a reprimand. On May 9, 2016, an Air Force CCA panel that included Judge Mitchell affirmed. *Id.* at 108–18. CAAF granted Morchinek's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 105.

Petitioner Kelvin I.L. O'Shaughnessy is an Airman First Class in the U.S. Air Force who was convicted of sexual assault and abusive sexual contact, and was sentenced to a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and a reduction in grade. On May 5, 2016, an Air Force CCA panel that included Judge Mitchell affirmed. *Id.* at 122–31. CAAF granted O'Shaughnessy's petition for review, but, after *Dalmazzi*, vacated the grant and denied relief. *Id.* at 119.

6. *Ortiz* v. *United States* (No. 16-1423)

Petitioner Keanu D.W. Ortiz is an Airman First Class in the U.S. Air Force who was convicted of knowingly and wrongfully viewing, possessing, and

distributing child pornography, and was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction in rank. On June 1, 2016 (one week after President Obama signed Judge Mitchell's commission), a panel of the Air Force CCA that included Judge Mitchell summarily rejected Ortiz's appeal. *Id.* at 149–50. Ortiz's case therefore became the vehicle for CAAF to reach the merits of the dual-officeholding claims that it had sidestepped in *Dalmazzi* and the cases consolidated in *Cox*.

On February 7, 2017, CAAF heard argument in *Ortiz*. Two days later, it issued a summary "order and judgment" stating only that "the decision of the Air Force Court of Criminal Appeals is hereby affirmed," and that "[t]he opinion of the Court will be issued on a future date." *Id.* at 144. CAAF issued its promised opinion on April 17, 2017. *Id.* at 132–43.

CAAF's opinion in *Ortiz* rejected Petitioner's claim that Judge Mitchell's appointment to the CMCR disqualified him from continuing to serve on the Air Force CCA. The court's analysis turned on two conclusions about the 1983 amendments to § 973(b). *First*, as CAAF noted, the amendments removed from the statute's text the automatic termination rule. *See* 10 U.S.C. § 973(b) (1982) ("The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment."). The court reasoned that Congress, by deleting this language, "aimed at the holding of 'civil office' . . . rather than the performance of assigned military duty." J.A. 139. Thus, § 973(b)(2)(A) "might prohibit Judge Mitchell from holding office at the USCMCR . . . but nothing in the text suggests that it

prohibits Judge Mitchell from carrying out his assigned military duties at the CCA." *Id.*

Second, CAAF believed that this reading was confirmed by Congress's simultaneous addition of a saving clause. *See* 10 U.S.C. § 973(b)(5) ("Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties."). According to CAAF, that provision "applies by its terms to Judge Mitchell's assigned official duties at the CCA." J.A. 138. Thus, the dual-officeholding ban "may indeed affect Colonel Mitchell's status as a judge of the [CMCR], but that is not for us to decide." *Id.* at 142.

CAAF then held that there was no Appointments Clause problem with Judge Mitchell's dual service—or with having someone who has principal officer status as an "additional judge" on the CMCR sitting alongside inferior officers on a CCA. *Id.* at 141–42. After receiving an extension of time from the Chief Justice, Ortiz timely petitioned for certiorari.

* * *

On September 28, 2017, this Court granted certiorari in *Dalmazzi*, *Cox*, and *Ortiz*, consolidated the petitions for briefing and argument, and added to the questions presented "[w]hether this Court has jurisdiction to review the cases in Nos. 16-961 [*Dalmazzi*] and 16-1017 [*Cox*] under 28 U.S.C. § 1259(3)." *Id.* at 1.

SUMMARY OF ARGUMENT

The core dispute in this case is whether President Obama's appointments to the CMCR of Judges Burton, Celtnieks, Herring, and Mitchell violated § 973(b)(2)(A)'s dual-officeholding ban. Although the

government has objected to this Court reaching the merits in *Dalmazzi* and *Cox*, all three petitions—not only *Ortiz*—properly raise this question.

I. *a.* In all eight of the Petitioners' cases, including *Dalmazzi* and the six cases consolidated in *Cox*, this Court has jurisdiction for the simple reason that CAAF "granted a petition for review under section 867(a)(3) of title 10." 28 U.S.C. § 1259(3). Although the government has argued in *Dalmazzi* and *Cox* that CAAF's subsequent vacaturs of its grants and denials of review divested this Court of jurisdiction, such a "parsimonious" construction of § 1259, *United States* v. *Denedo*, 556 U.S. 904, 909 (2009), is belied by the plain text of § 1259(3), its unambiguous purpose, and the serious constitutional problems that would arise from giving a lower court the power to insulate its interpretations of federal law from this Court's oversight by concluding its merits holdings with a "denial" of a discretionary petition previously granted.

b. *Dalmazzi* and the cases consolidated in *Cox* are not moot. Section 973(b)(2)(A) provides that a military officer "may not hold, *or exercise the functions of*, a civil office in the Government of the United States." It is therefore irrelevant whether Petitioners' CCA appeals had been resolved before President Obama signed the challenged judges' commissions. Because of the dual-officeholding ban's plain text, "any objection" to occupation of an unauthorized civil office "could not depend upon the formality of appointment." Olson Memo at 5 n.9. For purposes of § 973(b)(2)(A), all that matters is that the judges were "exercis[ing] the functions" of appointed CMCR judges by the time they participated in Petitioners' CCA panels. Because each of the judges was so acting by that point, this Court should reach the merits in all three petitions.

II. Congress has long provided that a military officer generally may not hold, or exercise the functions of, a "civil office . . . that requires nomination by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii). A presidentially appointed judgeship on the CMCR is such an office, and Congress has not "otherwise authorized by law" the appointment of military officers to such an office. The four CCA judges' service as "appointed judges" on the CMCR therefore violates the dual-officeholding ban.

a. The CMCR is an Article I court of record. Civilians may (and do) serve as judges on the CMCR, and the court reviews judgments of military commissions against defendants who are not U.S. servicemembers (in many cases, for ordinary, domestic crimes). CMCR judges therefore hold a "civil office" under § 973(b)(2)(A)—a term that the Justice Department has long given "a very liberal interpretation." *Army Officer Holding Civil Office*, 18 Op. Att'y Gen. 11, 12 (1884); *see also* Harmon Memo at 150 n.4 ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad interpretation of the term 'civil officer.'").

b. The "civil office" held by judges presidentially appointed to the CMCR under 10 U.S.C. § 950f(b)(3) also "requires an appointment by the President by and with the advice and consent of the statute," 10 U.S.C. § 973(b)(2)(A)(ii), by virtue of both the MCA and the Constitution. The MCA draws a bright-line distinction between "assigned" and "appointed" judges, and its plain text demands that those falling into the latter category—including the four judges at issue in this case—be appointed by the President with Senate confirmation. In any event, the Appointments Clause

of the Constitution requires that *all* CMCR judges be appointed by the President by and with the advice and consent of the Senate, because CMCR judges are principal Executive Branch officers under both *Morrison* v. *Olson*, 487 U.S. 654 (1988), and *Edmond* v. *United States*, 520 U.S. 651 (1997). CMCR judges are subject to almost no supervision by other Executive Branch officials, and they have the power to render a final decision on behalf of the Executive Branch with respect to military commission proceedings. Thus, whether as a matter of statutory or constitutional command, the CMCR judges at issue in this case hold a "civil office" that requires presidential nomination and Senate confirmation.

c. Congress has not expressly or unambiguously authorized "by law" the presidential appointment of *military officers* to sit as CMCR judges. Although the MCA clearly contemplates that the Secretary of Defense may "assign" certain active-duty military officers to the CMCR, *see* 10 U.S.C. § 950f(b)(2), it says nothing at all about the *appointment* of such military officers to the court. *Id.* § 950(f)(b)(3). "The difference between the power to 'assign' officers to a particular task and the power to 'appoint' those officers is not merely stylistic." *Edmond*, 520 U.S. at 657. Instead, the fact that the MCA only authorizes the *assignment* of military officers to the CMCR "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss* v. *United States*, 510 U.S. 163, 172 (1994) (emphasis added). Congress in the MCA consciously established two distinct categories of CMCR judges, subject to two different rules of selection and removal by two different officers. Congress therefore did *not*

"authorize" military officers to serve on the CMCR as presidentially appointed judges, and President Obama's appointments to the CMCR of Judges Burton, Celtnieks, Herring, and Mitchell violated § 973(b)(2)(A)(ii).

III. For as long as it has been on the books, the default remedy for a violation of § 973(b)(2)(A) has been the offending officer's immediate separation from the military—a codification of the common-law doctrine of incompatibility. That remains true today. *See, e.g.*, Thompson Memo at 3; DoD Directive 1344.10, § 4.6.1, at 9; *see also* SoCo Advisory 02-21 ("The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office.").

In *Ortiz*, CAAF nevertheless concluded that any violation of the dual-officeholding ban would affect these judges' CMCR service, not their ability to serve on the CCAs. CAAF rested its analysis on 10 U.S.C. § 973(b)(5), which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." But CAAF, like the government, read this provision entirely out of context.

The text of both § 973(b)(5) itself (referring to "assigned official duties") and of adjacent provisions in the 1983 amendments underscore that this language was meant to insulate from collateral attack actions undertaken by military officers in civil offices to which they had unlawfully been *assigned*. But the 1983 amendments also removed such offices from the dual-officeholding ban's coverage going forward—such that § 973(b)(5) would only be retroactive in its application. After and because of the 1983 amendments, it is no

longer possible for a military officer to violate § 973(b)(2)(A) "in furtherance of *assigned* official duties"; indeed, the law today expressly authorizes such assignments. *See id.* § 973(b)(2)(B). Thus, where, as here, the violation results from a second, unauthorized *appointment*, it disqualifies the appointee from continuing to serve in the military (and, as such, on the CCAs).

IV. Any other reading of § 973(b) would give rise to serious constitutional problems under both the Appointments Clause and the Commander-in-Chief Clause. To the former, if the same individual can simultaneously serve on one of the CCAs as an inferior Executive Branch officer and on an Article I court like the CMCR as a principal Executive Branch officer, that would give rise to the kind of unconstitutional incongruity described by this Court in *Ex parte Siebold*, 100 U.S. 371, 398 (1879). *Cf. Dep't of Transp.* v. *Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) (identifying an Appointments Clause problem when a multimember body heading an agency included both inferior and principal officers). "[T]he Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time." *Mistretta* v. *United States*, 488 U.S. 361, 404 (1989). Thus, any ambiguity as to whether the MCA authorizes (or § 973(b)(2)(A) does not prohibit) such dual service should be resolved to avoid such a fraught constitutional query. *E.g.*, *Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting a statute to not authorize a mixed panel of Article III and Article IV judges in order to avoid constitutional objections).

And because military officers appointed as CMCR judges "may be removed by the President only for

cause and not at will," *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016), they are not subject to the President's direct superintendence—which raises a serious constitutional question under the Commander-in-Chief Clause. *See, e.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850). Interpreting the MCA and § 973(b) to allow the appointment of military officers *qua* military officers to the CMCR would thus raise, rather than avoid, serious constitutional questions.

* * *

Although it has long resided in obscurity, the dual-officeholding ban codified at § 973(b)(2)(A) has served since its enactment as a significant expression of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). CAAF's decisions in *Dalmazzi* and the cases consolidated in *Cox* wrongly avoided the merits of the questions presented, and its decision in *Ortiz* got those merits wrong. Indeed, if affirmed, *Ortiz* would deprive § 973(b)(2)(A) of most of its force—and thereby jeopardize "the American constitutional tradition of a politically neutral military establishment under civilian control." *Greer* v. *Spock*, 424 U.S. 828, 839 (1976). The decisions below should be reversed.

ARGUMENT

I. This Court May Reach the Merits of All Three Petitions

A. The Court Has Jurisdiction In Each of Petitioners' Cases

Under 28 U.S.C. § 1259(3), "[d]ecisions of [CAAF] may be reviewed by the Supreme Court in . . . [c]ases in which [CAAF] granted a petition for review under

section 867(a)(3) of title 10."[15] All eight of the cases before the Court satisfy the plain text of this provision for the simple reason that, in each one, CAAF granted a petition for review and issued a decision. *See* p. 3, *supra*.

In opposing the *Dalmazzi* and *Cox* petitions,[16] the government argued that § 1259(3) "does not apply here because the CAAF 'vacate[d]' its orders granting review and then 'denied' the petitions for review." *Dalmazzi* Br. Opp. 10. This interpretation cannot be reconciled with the text of § 1259(3) or the context in which it was enacted. Nor does it make any sense; if the government were correct, it would give CAAF the extraordinary power to thwart this Court's oversight of its rulings whenever it sees fit—a power that (1) Congress did not intend to confer; (2) would raise serious constitutional questions; and (3) the government has previously (and successfully) argued doesn't exist.

Turning first to the text, § 1259(3) is a straightforward provision that conditions this Court's jurisdiction on a basic question: Did CAAF exercise its discretion to review the case at issue—to "grant[] *a* review," 10 U.S.C. § 867(a)(3) (emphasis added), and then issue a "decision"? When, as in *Dalmazzi*, CAAF grants a petition, receives briefs on the merits,

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15. Under 10 U.S.C. § 867(a)(3), CAAF has jurisdiction to hear all cases "reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, [CAAF] has granted a review."

16. The government has not contested this Court's jurisdiction in *Ortiz*, and for good reason. There, it is common ground that CAAF "granted a petition for review" within the meaning of § 1259(3). *See Ortiz* Br. Opp. 8 n.1.

conducts oral argument, and issues a decision disposing of the case, the answer must be "Yes," no matter how CAAF characterizes its disposition. Simply put, the plain text of § 1259(3) is satisfied in any case in which CAAF (1) grants a petition for review; and (2) issues a decision, whatever its terms.

The context in which § 1259(3) was enacted reinforces the plain meaning of its text. When Congress first gave this Court appellate jurisdiction over CAAF in the Military Justice Act of 1983, it was reacting to the Executive Branch's well-taken concern that "[t]here is no other federal judicial body whose decisions are similarly insulated from Supreme Court review." *Hearing on S. 974 Before the Military Personnel & Compensation Subcommittees of the S. Comm. on Armed Services*, 97th Cong. 2d Sess. 41 (1982) (written statement of William H. Taft, IV, General Counsel, Dep't of Defense).

To remedy that deficiency, Congress adopted the government's recommendation to balance the need for appellate oversight with the desire to protect this Court's docket. To that end, § 1259 limits "direct Supreme Court review of military justice cases . . . to those *actually considered* by [CAAF]." S. REP. NO. 98-53, at 33 (1983) (emphasis added). In other words, § 1259 was designed to tie this Court's jurisdiction to what CAAF did, not to what its ultimate disposition said. *See id.* at 34 ("[R]estricting direct access to the Supreme Court to cases the Court of Military Appeals *has agreed to hear* is necessary as a practical matter." (emphasis added)).

On the government's contrary reading, CAAF could insulate a decision from this Court's purview simply by vacating a grant of review at the end of any

opinion, no matter how substantive. Lest *Dalmazzi* be cast as an outlier, this indeed appears to be a common practice at least in cases in which, after granting review, CAAF concludes that it lacks jurisdiction. *See, e.g.*, *United States* v. *Moss*, 73 M.J. 64, 69 (C.A.A.F. 2014); *Rodriguez*, 67 M.J. at 116. This Court has construed 28 U.S.C. § 1254 to avoid this exact possibility, *i.e.*, that "decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).[17] It should do the same for § 1259(3).

Nor can the government reconcile its position in this case with *Denedo*, where it opposed the very construction of § 1259(4) that it now proffers of § 1259(3). *See* Reply Brief for the Petitioner at 5 n.1, *United States* v. *Denedo*, 555 U.S. 1041 (2008) (mem.), 2008 WL 4887709 (criticizing a proffered reading of § 1259(4) that "would provide a means for the CAAF to insulate its own decisions from further review"). The government was as right then as it is wrong now. *See Denedo*, 556 U.S. at 909 (accepting the government's argument and rejecting such a "parsimonious" construction of § 1259(4)).

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17. CAAF has repeatedly granted petitions for review solely to correct typographical errors below. *E.g.*, *United States* v. *Smedley*, 75 M.J. 4, 4 n.* (C.A.A.F. 2015) (mem.); *United States* v. *Mandy*, 74 M.J. 179, 179 n.* (C.A.A.F. 2014) (mem.); *see* Eugene R. Fidell & Dwight H. Sullivan, *Guide to the Rules and Practice for the United States Court of Appeals for the Armed Forces* § 21.03[7], at 193–96 (16th ed. 2017). It would be more than a little odd to conclude that Congress meant for *those* cases to fall within this Court's appellate jurisdiction, but not cases in which CAAF considered and rejected a colorable statutory and constitutional challenge to a criminal conviction and then purported to vacate a grant and "deny" review.

Especially when CAAF hears cases, like these, that present federal questions transcending military law, it would raise serious constitutional concerns if CAAF could shield substantive rulings from this Court's oversight. *See, e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring) ("[I]f it should later turn out that statutory avenues . . . for reviewing a [lower-court ruling] were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open.").[18] Thus, even if § 1259(3) is ambiguous as to whether it is satisfied when CAAF purports to vacate an earlier grant of review (and it isn't), any ambiguity should be resolved in a manner that avoids, rather than provokes, constitutional objections. *See, e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 381–82 (2005). This Court therefore has jurisdiction not just in *Ortiz*, but in *Dalmazzi* and *Cox*, as well.

B. The Petitioners' Claims in *Dalmazzi* and *Cox* are Not "Moot"

CAAF concluded in *Dalmazzi* that the Petitioner's dual-officeholding challenge was "moot" because Judge Mitchell did not serve in a "civil office" triggering § 973(b)(2)(A)(ii) until President Obama signed his commission on May 25, 2017, 13 days after the Air Force CCA ruled on Dalmazzi's appeal. J.A. 10. This conclusion was wrong. Petitioners' claims are not "moot," nor are they otherwise nonjusticiable.

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18. Collateral review of courts-martial via habeas corpus is limited to claims that were not "fully and fairly" considered by the military courts. *See Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Thomas* v. *U.S. Disciplinary Barracks*, 625 F.3d 667, 671 (10th Cir. 2010). Thus, a CAAF merits ruling accompanied by a vacatur of the underlying grant of review could also serve to preclude collateral relief.

"As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). Petitioners, each of whose sentences include significant punishment and dismissal from the military, unquestionably have an interest in pursuing the disqualification of the four judges. Their appeals therefore were not—and are not—"moot."

CAAF's holding in *Dalmazzi* in truth appears not to be predicated on "mootness"—at least in the Article III sense of that term. *See Dalmazzi* Br. Opp. 11–12. Instead, CAAF's analysis rested on an alleged factual inadequacy that goes to the *merits* of the dual-officeholding claim, namely, that the President did not formally appoint Judge Mitchell to the CMCR until 13 days after he participated in Dalmazzi's CCA appeal.

The dual-officeholding ban, however, is not triggered merely once a military officer "holds" a covered civil office; it provides that an active-duty officer "may not hold, *or exercise the functions of*," such an office. 10 U.S.C. § 973(b)(2)(A) (emphasis added). The statute is therefore implicated as soon as a military officer begins to exercise the functions of an unauthorized civil office, regardless of whether (or when) the President signs the commission and thereby formalizes the appointment.

Because of this text, the Justice Department has long (and correctly) taken the position that "any objection" to occupation of such an office "could not depend upon the formality of appointment." Olson Memo at 5 n.9. As Attorney General Williams concluded three years after § 973(b)(2)(A) was first enacted, General Sherman could not even temporarily

assume the office of Secretary of War because "[h]e cannot . . . be appointed to discharge the duties of that office, *nor can he exercise its functions*, without ceasing to be an officer of the Army of the United States." *Acting Secretary of War*, 14 Op. Att'y. Gen. 200, 201 (1873) (emphasis added); *see Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 122 (2007) [hereinafter "Bradbury Memo"] ("[I]t does not follow that a person not commissioned does not hold an office.").

For purposes of § 973(b)(2)(A), then, the relevant question is not when President Obama formally concluded his appointment of the four judges to the CMCR; it is when they began to "exercise the functions" of presidentially appointed CMCR judges. Given that all four judges were confirmed on April 28, 2016, that they each swore oaths of office as presidentially appointed CMCR judges on May 2, 2016, and that they each began participating in CMCR cases immediately thereafter (if not sooner), *see* J.A. 177–78, all four judges were "exercising the functions" of an appointed CMCR judge when they decided Petitioners' CCA appeals.

Each of the seven Petitioners whose cases are consolidated in *Dalmazzi* and *Cox* therefore brought timely challenges to the eligibility of at least one of the judges who participated in their CCA appeals. And "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995). This Court therefore should reach the merits in *Dalmazzi* and *Cox*, and not just in *Ortiz*.

II. The Appointment of Military Officers to the CMCR Violates § 973(b)(2)(A)(ii)

The central substantive question in these cases is whether President Obama's appointments of Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR violated § 973(b)(2)(A)'s dual-officeholding ban. This question must be answered in the affirmative, because (1) CMCR judges hold a "civil office"; (2) appointments to that office require nomination by the President and confirmation by the Senate; and (3) Congress has not specifically authorized military officers to receive such appointments.

A. CMCR Judges Hold a "Civil Office"

Section 973(b)(2)(A) prohibits active-duty officers from holding certain "civil offices," but does not define the term. The dual-officeholding ban's origins and history, however, "underscore[] the intended breadth of the provision." Olson Memo at 13. Indeed, the political branches have long embraced "a very liberal interpretation of the phrase 'civil office'" in § 973(b)(2)(A). *Army Officer Holding Civil Office*, *supra*, at 12. They have done so for good reason:

> What was intended was a strict separation of the military and civilian establishment through the elimination of any possibility that persons who were part of the military establishment and subject to military discipline could be placed in positions of authority in the civil government.

Olson Memo at 16; *see also* Harmon Memo at 150 n.4 ("The Attorneys General . . . have ruled that . . . the

policy of the statute points to a very broad interpretation of the term 'civil officer.'").[19]

Not only did the Congress that enacted § 973(b)(2)(A) intend for the term "civil office" to be interpreted capaciously, but "Congress's actions in subsequent years attest to its continued endorsement of the expansive definition . . . intended by the 41st Congress." Olson Memo at 16. In particular, Congress has legislated narrow, express exceptions to § 973(b)(2)(A) that encompass a "range of offices," "reflect[ing] Congress's assumption that the law's prohibition extends to all manner of civil office," *id.* at 17, including those nominally *within* the military.

Among many other examples, the Olson Memo cited statutes that expressly authorize the Chiefs of Staff of the Army and Air Force, the Chief of Naval Operations, and the Commandant of the Marine Corps to serve as acting secretary of the relevant service branch in circumstances in which no other designated successor can do so. *See* 10 U.S.C. §§ 3017(4), 5017(4), 5017(5), 8017(4). As these statutes suggest, Congress has consistently treated as civil offices even those with military functions—so long as the office can be held *by* civilians, or includes authority *over* civilians.[20]

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19. As OLC noted in 1983, "[b]oth the Attorney General and the Comptroller General have construed the statutory term 'civil office' broadly, and have generally declined to imply exceptions to § 973(b)'s comprehensive coverage." Olson Memo at 18; *see also id.* at 18–24 & nn.23–28 (citing and discussing nine Attorney General opinions, two OLC opinions, and seven Comptroller General opinions).

20. The breadth of the term "civil office" in § 973(b)(2)(A) is why Congress added three narrowing conditions to the statute in 1983—including the requirement at issue here, *i.e.*, that the civil

II. The Appointment of Military Officers to the CMCR Violates § 973(b)(2)(A)(ii)

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Section 973(b)(2)(A) prohibits active-duty officers from holding certain "civil offices," but does not define the term. The dual-officeholding ban's origins and history, however, "underscore[] the intended breadth of the provision." Olson Memo at 13. Indeed, the political branches have long embraced "a very liberal interpretation of the phrase 'civil office'" in § 973(b)(2)(A). *Army Officer Holding Civil Office*, *supra*, at 12. They have done so for good reason:

> What was intended was a strict separation of the military and civilian establishment through the elimination of any possibility that persons who were part of the military establishment and subject to military discipline could be placed in positions of authority in the civil government.

Olson Memo at 16; *see also* Harmon Memo at 150 n.4 ("The Attorneys General . . . have ruled that . . . the

policy of the statute points to a very broad interpretation of the term 'civil officer.'").[19]

Not only did the Congress that enacted § 973(b)(2)(A) intend for the term "civil office" to be interpreted capaciously, but "Congress's actions in subsequent years attest to its continued endorsement of the expansive definition . . . intended by the 41st Congress." Olson Memo at 16. In particular, Congress has legislated narrow, express exceptions to § 973(b)(2)(A) that encompass a "range of offices," "reflect[ing] Congress's assumption that the law's prohibition extends to all manner of civil office," *id.* at 17, including those nominally *within* the military.

Among many other examples, the Olson Memo cited statutes that expressly authorize the Chiefs of Staff of the Army and Air Force, the Chief of Naval Operations, and the Commandant of the Marine Corps to serve as acting secretary of the relevant service branch in circumstances in which no other designated successor can do so. *See* 10 U.S.C. §§ 3017(4), 5017(4), 5017(5), 8017(4). As these statutes suggest, Congress has consistently treated as civil offices even those with military functions—so long as the office can be held *by* civilians, or includes authority *over* civilians.[20]

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19. As OLC noted in 1983, "[b]oth the Attorney General and the Comptroller General have construed the statutory term 'civil office' broadly, and have generally declined to imply exceptions to § 973(b)'s comprehensive coverage." Olson Memo at 18; *see also id.* at 18–24 & nn.23–28 (citing and discussing nine Attorney General opinions, two OLC opinions, and seven Comptroller General opinions).

20. The breadth of the term "civil office" in § 973(b)(2)(A) is why Congress added three narrowing conditions to the statute in 1983—including the requirement at issue here, *i.e.*, that the civil

The Justice Department has gone even further, concluding that "[i]f the position is one established by statute, and if its duties involve the exercise of 'some portion of the sovereign power,' it is a 'civil office' within the prohibition of § 973(b)." Olson Memo at 24; *see also* 44 Comp. Gen. 830, 832 (1965) ("The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent; and they must involve some exercise of the sovereign power.").

Judges appointed by the President to the CMCR under § 950f(b)(3) easily satisfy this definition. The position is established by statute (the MCA);[21] it has definite duties imposed by law (entertaining and adjudicating appeals from the military commissions); and it involves a clear exercise of the sovereign power of the United States. As noted above, civilians can (and do) serve as CMCR judges,[22] and the exclusive

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office require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

21. The 2009 amendments to the MCA reconstituted the CMCR as an Article I "court of record," 10 U.S.C. § 950f(a), in contrast to its prior status solely within the Department of Defense. *See Khadr*, 823 F.3d at 96. As in *Freytag* v. *C.I.R.*, "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," 501 U.S. 868, 888 (1991).

The CMCR therefore far more closely resembles CAAF itself, *see* 10 U.S.C. § 941, and the U.S. Court of Appeals for Veterans' Claims, *see* 38 U.S.C. § 7251, than either the CCAs or the trial-level courts-martial or military commissions.

22. A "military office," in contrast, may only be filled by servicemembers. *See, e.g.*, 10 U.S.C. § 152(a)(1) (creating the office of Chairman of the Joint Chiefs of Staff); *cf. Smith* v. *United States*, 26 Ct. Cl. 143, 147 (1891) (noting that the "indicia of military . . . office" are "[r]ank, title, pay, and retirement"). As

function of the CMCR is to adjudicate appeals in criminal cases against individuals not part of the U.S. armed forces. *See* 10 U.S.C. § 948c (limiting military commission jurisdiction to offenses committed by "alien unprivileged enemy belligerents").

In opposing certiorari in *Ortiz*, the government nevertheless argued that, although the position of CMCR judge is an "office," *see Ortiz* Br. Opp. 12, it is not a *civil* office because "adjudication of violations of the law of war by military commissions is 'a classic military function,'" *id.* at 11 (quoting *Ortiz* Pet. App. 30a–31a). The fact that military officers have historically adjudicated law-of-war charges, however, hardly establishes that CMCR judgeships are not "civil" offices, especially when, as here, they are established by statute. After all, civilian triers of fact can adjudicate violations of the law of war, too. *See, e.g.*, 18 U.S.C. § 2441.

What's more, judges on the CMCR do not principally adjudicate whether defendants violated the law of war. Instead, they most often assess whether military commissions complied with *domestic* law established by Congress, including domestic-law criminal offenses defined in the MCA. *E.g.*, *United States* v. *Al Bahlul*, 820 F. Supp. 2d 1141 (Ct. Mil. Comm'n Rev. 2011), *aff'd in part on other grounds*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *cert. denied*, No. 16-1307, 2017 WL 1550817 (U.S. Oct. 10, 2017). And any argument that appellate oversight of military commissions is part of a "classic military

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OLC has explained, "military offices . . . are primarily characterized by the authority to command in the Armed Forces—commanding both people and the force of the government." Bradbury Memo at 91.

function" is belied by the novelty of such review—which did not exist until 2005. *See* p. 9 n.10, *supra*.

The government has also argued that CMCR judges "do not hold a 'civil office' because they act pursuant to military, rather than civil, authority." *Ortiz* Br. Opp. 12. It is not clear what the government means by this distinction, or why its resolution would determine whether an office is "civil" for purposes of § 973(b)(2)(A). In any event, CMCR judges *do* in fact act "pursuant" to "civil" authority: they are responsible for applying the MCA itself—a statute enacted by Congress that, among other things, created their office. Nor are CMCR judges answerable to, or removable by, any "military" authority; assigned judges can only be reassigned or withdrawn by the Secretary of Defense, and appointed judges can only be removed by the President.

For all of these reasons, CMCR judges hold a "civil office" for purposes of § 973(b)(2)(A).

B. Judges Appointed to the CMCR Require Presidential Nomination and Senate Confirmation

CMCR judges such as the four at issue here, who were appointed to the CMCR by the President by and with the advice and consent of the Senate, hold a "civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii). This criterion for triggering the dual-officeholding ban can be satisfied in either of two different ways: (i) if the statute creating the position itself requires such an appointment; or (ii) if the Constitution does so. Here, both the MCA and the Appointments Clause require that the judges receive such an appointment.

1. As for the statute, the text of the MCA could not be clearer: "The President may appoint, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* § 950f(b)(3). Entirely to avoid the Appointments Clause problem identified in *al-Nashiri I*, the President *appointed* each of Judges Burton, Celtnieks, Herring, and Mitchell, by and with the advice and consent of the Senate, to the CMCR—utilizing the *exclusive* statutory mechanism for presidential appointment to such an office.

To be sure, as the government argued in opposing certiorari, *see, e.g.*, *Ortiz* Br. Opp. 12–13, the MCA creates a mechanism by which the Secretary of Defense can "assign" military officers to be CMCR judges without a new, distinct presidential nomination and Senate confirmation. The statutory system of dual appointment methods, however, merely demonstrates that Congress gave the Executive Branch the power to staff two different types of judges on the CMCR: (1) military officers who have *previously* been appointed with the advice and consent of the Senate, *see Weiss*, 510 U.S. 163, but who are assigned to the CMCR by the Secretary of Defense; and (2) other judges who are appointed to the court by the President, with the Senate's approval. Although these two types of CMCR judges—"assigned" and "appointed"—serve alongside each other on the same court, that does not mean that they hold the same "office" for statutory or constitutional purposes. *See, e.g.*, 28 U.S.C. § 1 (distinguishing between the Chief Justice of the United States and the Associate Justices of the Supreme Court).

Nor are the two categories of CMCR judges interchangeable. Only the "appointed" judges may be civilians, for example. And, importantly, whereas the

Secretary or his designee may reassign or "withdraw" assigned judges from the CMCR, 10 U.S.C. § 949b(b)(4)(C), (D), only the President may remove CMCR judges who were appointed pursuant to § 950f(b)(3). *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) ("Under the traditional default rule, removal is incident to the power of appointment."); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839).

Moreover, the Secretary's authority to reassign or "withdraw" judges who have been "assigned" to the CMCR is procedurally constrained in a way that the President's authority to remove appointed CMCR judges is not. *See* 10 U.S.C. § 949b(b)(4)(C), (D) (providing that the Secretary may reassign or "withdraw" an assigned judge from the CMCR only after "consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member").[23]

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23. There is also a meaningful difference in the substantive grounds for removal of the two types of CMCR judges. The Secretary may reassign an assigned CMCR judge only "based on military necessity and . . . consistent with service rotation regulations," 10 U.S.C. § 949b(b)(4)(C), and only "for good cause consistent with applicable procedures under chapter 47 of this title." *Id.* § 949b(b)(4)(D).

By contrast, the statute is silent on the grounds for presidential removal of *appointed* judges. Because CMCR judges' functions are adjudicative, it follows that there are at least some "good cause" limits on the President's ability to remove those whom he appointed thereto. *Wiener* v. *United States*, 357 U.S. 349, 356 (1958); *see Khadr*, 823 F.3d at 98 ("[T]he Department [of Justice] has expressly represented that [CMCR judges appointed under § 950f(b)(3)] may be removed by the President only for cause and not at will.").

2. In any event, even if the MCA were construed to establish an undifferentiated, single office that does not "require[] an appointment by the President by and with the advice and consent of the Senate" for purposes of § 973(b)(2)(A), the Appointments Clause requires that *all* CMCR judges, assigned and appointed alike, be nominated by the President by and with the advice and consent of the Senate—because such judges are principal Executive Branch officers.

This Court's cases "have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond*, 520 U.S. at 661. But under the tests applied in either of this Court's leading precedents—*Morrison* and *Edmond*—CMCR judges are not "inferior" officers.

In *Morrison*, the Court held that the independent counsel created by provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–99 (1996), was an inferior officer based upon four factors: that a higher officer other than the President (the Attorney General) could remove her; that she performed only limited duties that did not include policymaking; that her jurisdiction was narrow; and that her tenure was limited. *See* 487 U.S. at 671–72. At least the last two of these four factors (and possibly the second, as well) do not describe CMCR judges, even when they are assigned to such an office by the Secretary of Defense. Their tenure is not limited to a single task at the end of which the office is terminated. Nor is their jurisdiction limited to reviewing the trials and judgments of only a discrete, known set of individuals and alleged offenses. *See Edmond*, 520 U.S. at 661. *Morrison*, therefore, does not support the conclusion that CMCR judges are inferior officers.

And *Edmond* all-but proves that they are not. In that case, the Court held that judges of the Coast Guard CCA were inferior officers because of two key characteristics: they were removable without cause by another, presidentially appointed officer (the Judge Advocate General); and, most importantly, all of their decisions were subject to review by another *Executive Branch* entity, to wit, CAAF. *Id.* at 664. "What is significant," Justice Scalia wrote for the unanimous Court, "is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665.

That is decidedly not the case for the CMCR, whose decisions are the final word of the Executive branch on military commission cases—and who "render a final decision on behalf of the United States" in review of a criminal conviction.[24] *al-Nashiri I*, 791 F.3d at 83 (explaining why CMCR judges more closely resemble principal officers under *Edmond*); *see also Intercollegiate Broadcasting Sys., Inc.* v. *Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012) (identifying the three factors *Edmond* used to differentiate between principal and inferior officers); *SoundExchange, Inc.* v. *Librarian of Congress*, 571 F.3d 1220, 1226–27 (D.C. Cir. 2009) (Kavanaugh, J.,

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24. It is also significant for purposes of the Appointments Clause that no other officer may remove "assigned" CMCR judges *without* cause. *See ante* at 36 & n.23 (describing substantive conditions for the Secretary's "reassignment" or "withdrawal" of assigned judges from the CMCR). *Compare Edmond*, 520 U.S. at 664 ("It is conceded by the parties that the Judge Advocate General may also remove a [CCA] judge from his judicial assignment without cause. The power to remove officers, we have recognized, is a powerful tool for control.").

concurring). Under *Edmond*, then, CMCR judges are principal officers, and must, under the Appointments Clause, be appointed to the CMCR by the President, by and with the advice and consent of the Senate. *Edmond*, 520 U.S. at 659–61; *Myers* v. *United States*, 272 U.S. 52, 129 (1926); *see also Weiss*, 510 U.S. at 189–91 (Souter, J., concurring).

C. The Appointment of Military Officers to Serve as CMCR Judges is Not "Otherwise Authorized by Law"

Section 973(b)(2)(A) allows military officers to hold, or exercise the functions of, a covered civil office where Congress has "otherwise authorized" it "by law." 10 U.S.C. § 973(b)(2)(A). This proviso codifies the background rule that a later Congress is not bound to adhere to the law enacted by an earlier Congress—that it may amend, or temper, that earlier enactment as it sees fit. In order to do so, however—to establish the statutory "authoriz[ation]" to which § 973(b)(2)(A) refers—Congress must make its intent pellucid. *See, e.g.*, 10 U.S.C. § 528. As OLC explained in 1979, the policy behind the dual-officeholding ban "cannot be overcome implicitly by a broad and vague statutory authority to designate [a civil officer] in the absence of express language stating that such designation is to be effective notwithstanding the mandate of 10 U.S.C. § 973(b)." Harmon Memo at 150; *see also id.* ("Where Congress wishes to permit a military officer to occupy a civilian position . . . without forfeiting his commission, it has done so explicitly.").

The MCA does not expressly provide—or even unambiguously imply—that the President may appoint military officers to serve as "additional judges" under 10 U.S.C. § 950f(b)(3). Indeed, if

§ 950f(b)(3) stood alone as the only means of designating individuals to be CMCR judges, the government would presumably concede that its language would not suffice to establish the sort of "authoriz[ation]" that § 973(b)(2)(A) requires.

To be sure, Congress has expressly indicated that military officers might serve as CMCR judges in *another* subsection of § 950f, authorizing the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [CMCR]" so long as they are "commissioned officer[s] of the armed forces." 10 U.S.C. § 950f(b)(2) (emphasis added). That provision, however, does not authorize the President (or anyone else, for that matter) to "appoint" such judges, military or otherwise; it merely authorizes the Attorney General to bestow additional duties upon officers already confirmed to an existing, inferior office. *See Weiss*, 510 U.S. at 171–72.

As Justice Scalia wrote for a unanimous Court in *Edmond*, "[t]he difference between the power to 'assign' officers to a particular task and the power to 'appoint' those officers is not merely stylistic." 520 U.S. at 657; *see also id.* ("Conspicuously absent from [the provision at issue], however, is any mention of the 'appointment' of military judges."). And it is familiar doctrine that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *see also Lindh* v. *Murphy*, 521 U.S. 320, 331 (1997) (noting "the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already

been joined together and were being considered simultaneously when the language raising the implication was inserted"). Thus, the fact that the MCA provision that *does* contemplate service by military officers (§ 950f(b)(2)) only allows their "assignment" by the Secretary of Defense "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss*, 510 U.S. at 172 (emphasis added).

Nor is this simply a technical, formal distinction. Congress may have had very good reasons to allow the Secretary to assign military officers to the CMCR, but not to intend for the President to be able to appoint them to a new office on the same court. Among other things, judges "appointed" under § 950f(b)(3) are subject to the Senate's review (and influence); they are removable by a different actor than those "assigned" under § 950f(b)(2) (the President instead of the Secretary of Defense); and their removal comes with distinct substantive and procedural restrictions.

Thus, although the two types of CMCR judges might be "substantively identical" in terms of their duties, *Ortiz* Br. Opp. 10, Congress has treated them as two distinct positions—one that requires a second appointment, and one that does not. Congress thus did *not* "authorize" military officers to hold office on the CMCR in the capacity in which Judges Burton, Celtnieks, Herring, and Mitchell are now serving.

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When Judges Burton, Celtnieks, Herring, and Mitchell were nominated and confirmed to the CMCR under § 950f(b)(3) and began exercising the functions of those offices, that may well have cured the

Appointments Clause defect flagged by the D.C. Circuit in *al-Nashiri I*. But the appointments violated § 973(b)(2)(A)'s dual-officeholding ban in the process.

III. The Proper Remedy for a § 973(b)(2)(A) Violation is the Officers' Immediate Termination from the Military

CAAF held in *Ortiz* that, even if the appointments of these four judges to the CMCR violated § 973(b)(2)(A), that would only affect the validity of *those* appointments, not the judges' military status or their continuing service on the CCAs. The history of § 973(b)(2)(A), the purpose of the 1983 amendments thereto, and the government's consistent practice since then, each demonstrate that CAAF erred, and that the appointments of these four military officers on the CMCR should have resulted in their immediate termination from the military—thereby disqualifying them from continuing to serve on the CCAs.

A. An Officer Who Accepts a Second, Incompatible Office Must Generally Forfeit the First Office

As initially enacted (and until 1983), § 973(b)(2)(A) expressly provided that a military officer "accepting or exercising the functions of a civil office shall at once cease to be an officer of the Army, and his commission shall be vacated thereby." *See* pg. 4, *supra*. In so providing, the dual-officeholding ban codified the common-law doctrine of incompatibility, under which "an office holder was not ineligible to appointment or election to another incompatible office, but *acceptance of the latter vacated the former*." *Lopez* v. *Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) (emphasis added). *See generally* Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* §§ 419–31, at 267–76

(Callaghan & Co. 1890) (describing the origins and scope of the doctrine of incompatibility). As Mechem explains, "[i]t is a well settled rule of the common law that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* absolutely vacates the first office and his title is thereby terminated without any other act or proceeding." Mechem, *supra*, § 420, at 267–68; *see also id.* § 429, at 272 (explaining that the same default rule applies in cases in which the incompatibility is created by the Constitution or statute).

It is certainly correct, as CAAF observed in *Ortiz*, that Congress deleted the automatic termination language from § 973(b)(2) when it amended that provision in 1983. But there is no indication that Congress did so in order to prospectively overturn that common-law rule—which would have attached to the dual-officeholding ban even if Congress had never expressly referred to it. And "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Not only do the text and legislative history of the 1983 amendments evince no such sweeping congressional purpose, they point rather squarely in the opposite direction—a conclusion that, outside of this litigation, at least, the government has continued to share.

For example, the same section of the statute that amended § 973(b)(2)(A) separately authorized the President to appoint an active-duty military officer to serve as Chairman of the Red River Compact Commission, and provided that acceptance of such an appointment "shall not terminate or otherwise affect

[the appointee's] appointment as a military officer." 1984 DoD Authorization Act § 1002(d), 97 Stat. at 656; *see also* S. REP. NO. 98-174, at 258. If Congress had, as CAAF held in *Ortiz*, eliminated termination as the default remedy for violations of § 973(b)(2)(A), there would have been no need for section 1002(d)—part of the same section of the same statute—to so provide.

More generally, the principal impetus for the 1983 amendments to the dual-officeholding ban was the need to address two problems that had arisen from the assignment of JAG lawyers to serve as Special Assistant U.S. Attorneys. Congress thus sought to narrow the scope of § 973(b)(2)(A) to exclude Special Assistant U.S. Attorneys going forward; to preclude potentially thousands of retrospective challenges to civilian criminal convictions obtained by military officers who, according to OLC, had been unlawfully assigned to hold a "civil office"; and to protect those officers from what would otherwise have been their mandatory termination from the military. *See* S. REP. NO. 98-174, at 233–34 (describing the purposes of the provision as addressing the concerns raised by the Olson Memo); H.R. CONF. REP. NO. 98-352, at 233 ("The clarification was necessary to permit military personnel assigned to Judge Advocate General's Corps duties to continue assisting attorneys in the Department of Justice with cases related to military installations and other military matters."). And as CAAF explained in *Ortiz*, "[t]he report language on the provision does not go beyond that situation." J.A. 138 n.1; *see also* S. REP. NO. 98-174, at 233 ("This provision does not sanction or endorse any use of military attorneys beyond that permitted under [the Olson Memo's] interpretation.").

So construed, the 1983 amendments to § 973(b) provide no indicia of Congress's intent to eliminate the common-law incompatibility rule as the *forward-looking* remedy for violations of § 973(b)(2)(A). Instead, Congress meant to—and did—eliminate termination as a default remedy for violations that pre-dated the amendments, exactly as OLC had recommended. *See* 10 U.S.C. § 973 note; Olson Memo at 6 ("§ 973(b) as construed in this opinion should be given only prospective application to the practice in question.").[25]

B. Section 973(b)(5) Is Not to the Contrary

CAAF's rejection of the dual-officeholding claim in *Ortiz* was predicated on its reading of § 973(b)(5), which provides that "Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." According to CAAF, the "assigned official duties" encompassed by this clause are all future duties undertaken by the offending officer in their *military* office—a result that would directly contradict the common-law automatic disqualification rule. *See* J.A.

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25. The government's regulations reinforce the conclusion that immediate separation from the military remains the default remedy for violations of § 973(b)(2)(A). *See* p. 8 & n.8, *supra* (discussing DoD Directive 1344.10). Thus, DoD's Standards and Conduct Office has made clear that "the directive, as a general rule, *requires* retirement or discharge for members elected or appointed to a prohibited civil office." SoCo Advisory 02-21, *supra* (emphasis added). Consistent with this understanding, OLC recently reiterated that, absent statutory authorization, the current version of § 973(b)(2)(A) "prohibit[s] continuation of military status . . . upon appointment to a covered position." Thompson Memo at 3 (internal quotation marks omitted).

139; *see also Ortiz* Br. Opp. 13 ("[A] violation of Section 973(b) [does] not entitle petitioner to relief.").

This analysis misreads the 1983 amendments, however, which were, in this respect, designed to address a discrete retrospective problem, not to abrogate the well-established common law rule for all future violations of the dual-officeholding ban. And unless a violation could now be ameliorated by disqualifying the officer from the unauthorized *civil* office,[26] it would also deprive § 973(b)(2)(A), which "embodies an important policy designed to maintain civilian control of the Government," Harmon Memo at 150, of most of its teeth.

Congress, however, "does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). And there is no indication that Congress in 1983 either intended or effected such a fundamental sea change in civil-military relations. Taking § 973(b)(5) first, the government stresses its reference to "*any* action," *Ortiz* Br. Opp. 14, while ignoring the qualifier: "in furtherance of assigned official duties." This latter phrase is crucial to understanding the purpose of the provision.

The government agrees that § 973(b)(5) was prompted by a desire to preclude challenges to criminal convictions obtained by military officers who, prior to the 1983 amendments to § 973(b), had been *assigned* to hold a "civil office" as Special Assistant U.S. Attorneys. *See Ortiz* Br. Opp. 14. Thus,

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26. To the contrary, the government has argued that § 973(b)(5) also insulates the four judges' *CMCR service* from legal challenge. *See* Brief for the United States in Opposition at 20–21, *In re Mohammad*, No. 17-1179 (D.C. Cir. filed Aug. 25, 2017), *available at* https://perma.cc/QS4J-XUYC.

Congress's focus was on immunizing those officers' actions in the civil office to which they had (unlawfully, as OLC concluded) been assigned, not on actions taken in their military capacity subsequent to their assignment to the unauthorized civil office.

Indeed, thanks to the 1983 amendments, it is no longer a violation of § 973(b)(2)(A) for an officer to hold or exercise the functions of a civil office "in furtherance of *assigned* official duties"; a prohibited civil office requires an election or an appointment. *See* 10 U.S.C. § 973(b)(2)(B) ("An officer to whom this subsection applies may hold or exercise the functions of a civil office . . . *when assigned or detailed* to that office or to perform those functions." (emphasis added)). This is why, as the Air Force JAG has explained, the saving clause would only have allowed an offending officer "to continue to serve [in the military] if elected or appointed [to an unauthorized civil office] before September 24, 1983," *i.e.*, the day on which § 973(b)(5) entered into force. *Reserve Officer Holding Civil Office*, 4 Civ. L. Op. JAG A.F. 391, 391 (Feb. 14, 1991). Congress's focus on "assigned" duties in § 973(b)(5) therefore demonstrates that the provision was only meant to have retroactive effect.

This reading of § 973(b)(5)'s text is confirmed by two additional provisions of the same statute—neither of which CAAF or the government has acknowledged. First, after amending § 973(b) in section 1002(a) of the 1984 DoD Authorization Act, Congress separately provided that the JAG lawyers would suffer no consequence by dint of their unlawful assignment to serve as civilian prosecutors—expressly overruling, for these limited purposes, the automatic disqualification rule:

> Nothing in [§ 973(b)], as in effect before the date of the enactment of this Act, shall be construed . . . to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer *in furtherance of assigned official duties.*

1984 DoD Authorization Act § 1002(b), 97 Stat. at 655 (codified at 10 U.S.C. § 973 note) (emphasis added).

Thus, in the very next subsection of the same statute, Congress (1) expressly solved the problem to which CAAF claimed § 973(b)(5) was implicitly addressed; (2) expressly overruled the common-law automatic disqualification rule in a limited class of cases; and (3) used the same phrase ("in furtherance of assigned official duties") to unambiguously refer to actions undertaken by military officers in the civil office to which they had previously been *assigned* without authorization. As the Court explained in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932), "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Id.* at 433. If "in furtherance of assigned official duties" has the same meaning in section 1002(a) that it clearly has in section 1002(b), then § 973(b)(5) does not apply here.

Second, as noted above, section 1002(d) of the 1983 Act also authorized the appointment of an active-duty military officer to the Red River Compact Commission, and specified that acceptance of that appointment "shall not terminate or otherwise affect such officer's appointment as a military officer." 1984 DoD Authorization Act § 1002(d), 97 Stat. at 656.

Again, if § 973(b)(5) had the meaning claimed by CAAF and the government, this provision would have been wholly unnecessary. *See Arlington Cent. Sch. Dist. Bd. of Ed.* v. *Murphy*, 548 U.S. 291, 299 n.1 (2006) ("[I]t is generally presumed that statutes do not contain surplusage"). Instead, it underscores the conclusion that § 973(b)(5) has no bearing here.

* * *

Because termination from the military remains a necessary consequence of exercising the duties of an unauthorized civil office under § 973(b)(2)(A), the CMCR appointments of Judges Burton, Celtnieks, Herring, and Mitchell should have resulted in their immediate separation from the military—and, as such, their disqualification from hearing the Petitioners' CCA appeals.[27] As such, all CCA decisions in which they participated after the dual-officeholding ban was triggered are not just voidable, but void. *See United States* v. *Jones*, 74 M.J. 95, 97 (C.A.A.F. 2015); *see also Ryder*, 515 U.S. at 182–83.

Nor can decisions by unlawfully constituted CCA panels be salvaged by the *de facto* officer doctrine. *See Nguyen* v. *United States*, 539 U.S. 69, 77 (2003) ("Whatever the force of the *de facto* officer doctrine in other circumstances, an examination of our precedents concerning alleged irregularities in the assignment of judges does not compel us to apply it in these cases."). The Petitioners are therefore entitled to new CCA appeals of their court-martial convictions.

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27. Civilians may serve on the CCAs, 10 U.S.C. § 866(a), but they must be appointed by the President and confirmed by the Senate. *United States* v. *Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014). None of the four judges at issue here was so appointed.

IV. Any Other Reading of § 973(b) Raises Serious Constitutional Questions

Finally, if § 973(b) is read to permit military officers to hold office simultaneously on the CMCR and the CCAs, that interpretation would give rise to serious constitutional questions under both the Appointments Clause and the Commander-in-Chief Clause.

A. Simultaneous Service on Both the CCAs and the CMCR Violates the Appointments Clause

With regard to the Appointments Clause, allowing the same individual to simultaneously hold office on one of the CCAs as an inferior Executive Branch officer and on an Article I court like the CMCR as a principal Executive Branch officer creates an unconstitutional "incongruity" akin to that Court identified in *Siebold*, 100 U.S. at 398. *See Morrison*, 487 U.S. at 675–76. In *Ortiz*, CAAF rejected this objection, contending that it wrongly "presumes that Col. Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." J.A. 141. In CAAF's view, there is no Appointments Clause problem any time an Executive Branch principal officer also holds a separate position as an inferior officer.

The problem with this reasoning is that, in the process, CAAF wholly ignored the possibility that the two positions, while not formally incompatible, might be functionally incompatible. After all, if a CMCR judge (as a principal officer) could serve alongside an Air Force CCA judge (as an inferior officer), the same logic would allow the President to nominate (and the

Senate to confirm) the sitting Secretary of Defense (or an Article III judge) to serve on the Air Force CCA.

But in that scenario, there is an obvious incongruity in having an individual with such authority (1) holding a second position through which he is subordinate to other Executive Branch officers; while at the same time (2) sharing decisionmaking authority with inferior officers who may well be unduly influenced by—or unduly seek to influence—his principal office. *Cf. Ass'n of Am. Railroads*, 135 S. Ct. at 1239 (Alito, J., concurring) (identifying an Appointments Clause problem when a multimember body heading an agency included both inferior and principal officers).

This concern is especially acute where, as here, the distinct offices are both *judgeships*, and involve overlapping personnel within the same department—in contrast to circumstances in which an individual simultaneously holds offices in two unrelated Executive Branch entities. "[T]he Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time." *Mistretta*, 488 U.S. at 404; *see also* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122–46 (1994) (summarizing—and endorsing—the "tradition of Judicial-Executive incompatibility").[28]

Whether such an arrangement rises to the level of functional incompatibility that is prohibited by the

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28. This Court in *Mistretta* rejected a challenge to judges also serving on independent commissions, but entirely because the latter function was "extrajudicial." *See* 488 U.S. at 397–404. Here, in contrast, both functions are quintessentially "judicial."

Appointments Clause (or the separation of powers, more generally) is a difficult question of first impression. In *Nguyen*, this Court suggested that it would "call into serious question the integrity as well as the public reputation of judicial proceedings" if an Article IV judge was allowed to participate alongside two Article III judges on a Ninth Circuit panel—but avoided the constitutional question by interpreting the relevant statute to not authorize such a mixed court. *See* 539 U.S. at 83 & n.17.

It is true, as the government argued in opposing certiorari in *Ortiz*, that Petitioners can "cite no authority holding that the Appointments Clause prohibits this sort of simultaneous service." *Ortiz* Br. Opp. 18. But it is equally true that the government has not identified a single prior example of an individual holding office and serving as both an inferior and a principal officer on two different federal courts—let alone precedent holding that such simultaneous service is constitutional. And "[p]erhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." *Free Enterprise Fund*, 561 U.S. at 505 (citation and internal quotation marks omitted).

Petitioners therefore submit that such simultaneous service is unconstitutional. But insofar as there is any ambiguity in whether § 973(b)(2)(A) permits the appointment of an active-duty military officer to serve as an "additional judge" on the CMCR, or in whether § 973(b)(5) immunizes subsequent actions of the officer in his military capacity, the ambiguity can and should be resolved so as to avoid even having to ask—let alone answer—such a difficult and novel constitutional question. *INS* v. *St. Cyr*, 533 U.S. 289, 301 n.13 (2001).

B. Service by Military Officers as CMCR Judges Also Raises a Serious Question Under the Commander-in-Chief Clause

"Additional judges" appointed to the CMCR under § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. Unlike CCA judges, then, they "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office." *Free Enterprise Fund*, 561 U.S. at 487; *see also Wiener*, 357 U.S. at 356. Where, as here, the CMCR judge at issue is an active-duty military officer, such a constraint on the President's power raises a Commander-in-Chief Clause concern of the first order. *See, e.g.*, *Fleming*, 50 U.S. (9 How.) at 615 ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]").

"Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power . . . in . . . military positions." *Orloff* v. *Willoughby*, 345 U.S. 83, 91 (1953); *see also Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 465 (1855) ("No act of Congress . . . can, by constitutional possibility, authorize or create any military officer not subordinate to the President."). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from appointment to the CMCR, then the good-cause removal protection for judges appointed under 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.

If the only infirmity with the appointment of active-duty military officers to the CMCR stems from the Commander-in-Chief Clause, that argument would provide no benefit to the Petitioners here, who are challenging those officers' continuing service as CCA judges. But the only way to avoid this constitutional problem is to interpret § 973(b)(2)(A) as the political branches, until this litigation, always had, and as the Petitioners do—as compelling these CMCR judges' termination from the military upon their exercise of the duties of a covered civil office.[29]

* * *

To be sure, these cases present the specific and narrow issue of active-duty military officers who have been appointed to the CMCR. But § 973(b)(2)(A) has historically swept far more broadly, and continues today to circumscribe the ability of men and women in uniform to simultaneously hold almost all Cabinet positions and thousands of other federal, state, or local civil offices requiring an appointment or an election. On the government's novel reading of the relevant statutes, the dual-officeholding ban would no longer serve that vital purpose in any context, let alone with respect to the CMCR. Such a result would frustrate the unambiguous purpose of § 973(b)(2)(A); it would have profound—and potentially deleterious—implications for the future of civil-military relations; and it would fly in the face of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird*, 408 U.S. at 15.

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29. Such a reading would also dispel with any continuing objection under § 973(b)(2)(A) to these judges' CMCR service; on Petitioners' view, they became civilians at the moment they began exercising the duties of appointed CMCR judges.

Conclusion

For the foregoing reasons and those previously stated, the decisions below should be reversed.

Respectfully submitted,

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Appendix

APPENDIX

I. CONSTITUTIONAL PROVISIONS

A. The Commander-in-Chief Clause, U.S. Const. art. II, § 2, cl. 1:

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.

B. The Appointments Clause, U.S. Const. art. II, § 2, cl. 2:

[The President] . . . by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

II. U.S. CODE PROVISIONS

A. 10 U.S.C. § 867. Review by the Court of Appeals for the Armed Forces.

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for

the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

B. 10 U.S.C. § 949b. Unlawfully influencing action of military commission and United States Court of Military Commission Review.

(a) Military commissions.

(1) No authority convening a military commission under this chapter [*10 USCS §§ 948a* et seq.] may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military

commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.

(2) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or

(C) the exercise of professional judgment by trial counsel or defense counsel.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a military judge or counsel.

(b) United States Court of Military Commission Review.

(1) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

(c) Prohibition on consideration of actions on commission in evaluation of fitness. In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

C. 10 U.S.C. § 950f. Review by United States Court of Military Commission Review.

(a) Establishment. There is a court of record to be known as the "United States Court of Military Commission Review" (in this section referred to as the "Court"). The Court shall consist of one or more panels, each composed of not less than three judges on the Court. For the purpose of reviewing decisions of military commissions under this chapter, the Court may sit in panels or as a whole, in accordance with rules prescribed by the Secretary of Defense.

(b) Judges.

(1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.

(2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.

(3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

(4) No person may serve as a judge on the Court in any case in which that person acted as a military judge, counsel, or reviewing official.

(c) Cases to be reviewed. The Court shall, in accordance with procedures prescribed under regulations of the Secretary, review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused.

(d) Standard and scope of review. In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by the convening authority. The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

(e) Rehearings. If the Court sets aside the findings or sentence, the Court may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Court sets aside the findings or sentence and does not order a rehearing, the Court shall order that the charges be dismissed.

D. 10 U.S.C. § 973. Duties: officers on active duty; performance of civil functions restricted

(a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.

(b) (1) This subsection applies—

(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days; and

(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days.

(2) (A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

(i) that is an elective office;

(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph

(A) when assigned or detailed to that office or to perform those functions.

(3) Except as otherwise authorized by law, an officer to whom this subsection applies by reason of subparagraph (A) of paragraph (1) may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State).

(4) (A) An officer to whom this subsection applies by reason of subparagraph (B) or (C) of paragraph (1) may not hold, by election or appointment, a civil office in the government of a State (or of any political subdivision of a State) if the holding of such office while this subsection so applies to the officer—

(i) is prohibited under the laws of that State; or

(ii) as determined by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, interferes with the performance of the officer's duties as an officer of the armed forces.

(B) Except as otherwise authorized by law, while an officer referred to in subparagraph (A) is serving on active duty, the officer may not exercise the functions of a civil office held by the officer as described in that subparagraph.

(5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

(6) In this subsection, the term "State" includes the District of Columbia and a territory, possession, or commonwealth of the United States.

(c) An officer to whom subsection (b) applies may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation.

(d) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.

E. 28 U.S.C. § 1259. Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

III. PUBLIC LAWS

A. Department of Defense Authorization Act, 1984, Pub. L. 98-94 (Sept. 24, 1983)

PERFORMANCE OF CIVIL FUNCTIONS BY MILITARY OFFICERS

SEC. 1002. (a) Section 973 of title 10, United States Code, is amended by striking out subsection 0t)) and inserting in lieu thereof the following:

"(b)(1) This subsection applies—

"(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

"(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days; and

"(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days.

"(2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

"(i) that is an elective office;

"(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

"(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

"(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

"(3) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government).

"(4) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

"(c) The Secretary of Defense, and the Secretary of Transportation, with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.". [sic]

(b) Nothing in section 973(b) of title 10, United States Code, as in effect before the date of the enactment of this Act, shall be construed—

(1) to invalidate any action undertaken by an officer of an Armed Force in furtherance of assigned official duties; or

(2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer in furtherance of assigned official duties.

(c) Nothing in section 973(b)(3) of title 10, United States Code, as added by subsection (a), shall preclude a Reserve officer to whom such section applies from

holding or exercising the functions of an office described in such section for the term to which the Reserve officer was elected or appointed if, before the date of the enactment of this Act, the Reserve officer accepted appointment or election to that office in accordance with the laws and regulations in effect at the time of such appointment or election.

(d) The Act entitled "An Act to grant the consent of the United States to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas", approved December 22, 1980 (94 Stat. 3305), is amended by adding at the end thereof the following new section:

"SEC. 5. (a) The President may appoint a regular officer of the Army, Navy, Air Force, or Marine Corps who is serving on active duty as the Federal Commissioner of the Commission.

"(b) Notwithstanding the provisions of section 973(b) of title 10, United States Code, acceptance by a regular officer of the Army, Navy, Air Force, or Marine Corps of an appointment as the Federal Commissioner of the Commission, or the exercise of the functions of Federal Commissioner and chairman of the Commission, by such officer shall not terminate or otherwise affect such officer's appointment as a military officer.". [*sic*]

IV. FEDERAL REGULATIONS

A. DoD Directive 1344.10

[SEAL] Department of Defense Directive

Number 1344.10

February 19, 2008

USD(P&R)

SUBJECT: Political Activities by Members of the Armed Forces

References:

(a) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces on Active Duty," August 2, 2004 (hereby canceled)

(b) Sections 973, 888, 101, and Chapter 47 of title 10, United States Code

(c) DoD Instruction 1334.1, "Wearing of the Uniform," October 26, 2005

(d) Section 441a of title 2, United States Code

(e) through (i), see Enclosure 1

1. PURPOSE

This Directive:

1.1. Reissues Reference (a) to update policies on political activities of members of the Armed Forces.

1.2. Implements section 973(b) through (d) of Reference (b).

2. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments (including the

Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components"). Paragraph 4.3. applies to members of the National Guard, even when in a non-Federal status. Other provisions apply to members of the National Guard while on active duty, which, for purposes of this Directive only, also includes full-time National Guard duty.

3. DEFINITIONS

The terms used in this Directive are defined in Enclosure 2.

4. POLICY

It is DoD policy to encourage members of the Armed Forces (hereafter referred to as "members") (including members on active duty, members of the Reserve Components not on active duty, members of the National Guard even when in a non-Federal status, and retired members) to carry out the obligations of citizenship. In keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement, the following policy shall apply:

4.1. [OMITTED]

4.2. [OMITTED]

4.3. [OMITTED]

4.4. Holding and Exercising the Functions of a U.S. Government Civil Office Attained by Election or Appointment

4.4.1. Paragraph 4.4. applies to a civil office in the U.S. Government that:

4.4.1.1. Is an elective office;

4.4.1.2. Requires an appointment by the President; or

4.4.1.3. Is in a position on the executive schedule under sections 5312-5317 of Reference (i).

4.4.2. A regular member, or retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days, may not hold or exercise the functions of civil office set out in subparagraph 4.4.1. unless otherwise authorized in paragraph 4.4. or by law.

4.4.3. A retired regular member, or a Reserve Component member on active duty under a call or order to active duty for 270 days or fewer, may hold and exercise the functions of a civil office provided there is no interference with the performance of military duty.

4.4.4. A member on active duty may hold and exercise the functions of a civil office under paragraph 4.4. when assigned or detailed (while on active duty) to such office to perform such functions, provided the assignment or detail does not interfere with military duties.

4.4.5. Any member on active duty authorized to hold or exercise or not prohibited from holding or exercising the functions of office under paragraph

4.4. are still subject to the prohibitions of subparagraph 4.1.2.

4.5. [OMITTED]

4.6. Actions When Prohibitions Apply

4.6.1. Members affected by the prohibitions against being a nominee or candidate or holding or exercising the functions of a civil office may request retirement (if eligible), discharge, or release from active duty. The Secretary concerned may approve these requests, consistent with the needs of the Service, unless the member is:

4.6.1.1. Obligated to fulfill an active duty service commitment.

4.6.1.2. Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile pay fire area.

4.6.1.3. Ordered to remain on active duty while the subject of an investigation or inquiry.

4.6.1.4. Accused of an offense under Chapter 47 of Reference (b) or serving a sentence or punishment for such an offense.

4.6.1.5. Pending other administrative separation action or proceedings.

4.6.1.6. Indebted to the United States.

4.6.1.7. In a Reserve Component and serving involuntarily under a call or order to active duty that specifies a period of active duty of more that 270 days during a period of declared war or national

emergency; or other period when a unit or individual of the National Guard or other Reserve Component has been involuntarily called or ordered to active duty as authorized by law.

4.6.1.8. In violation of this Directive or an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

4.6.2. Subparagraph 4.6.1. does not preclude a member's involuntary discharge or release from active duty.

4.6.3. No actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member having been a candidate or nominee for a civil office in violation of the prohibition of paragraph 4.2. or having held or exercised the functions of a civil office in violation of the prohibitions of paragraphs 4.4. or 4.5.

4.6.4. This is a lawful general regulation. Violations of paragraphs 4.1. through 4.5. of this Directive by persons subject to the Uniform Code of Military Justice are punishable under Article 92, "Failure to Obey Order or Regulation," Chapter 47 of Reference (b).

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Personnel and Readiness shall administer this Directive.

5.2. The Secretaries of the Military Departments shall issue appropriate implementing documents for their respective Departments.

6. RELEASABILITY

UNLIMITED. This Directive is approved for public release. Copies may be obtained through the Internet from the DoD Issuances Web Site at http://www.dtic.mil/whs/directives.

7. EFFECTIVE DATE

This Directive is effective immediately.

[signature]

Gordon England

[ENCLOSURES OMITTED]

V. OTHER MATERIALS

A. SoCo Advisory 02-21

SOCO Advisory

Department of Defense
December 16, 2002

Office of General Counsel
Number 0221

Standards of Conduct Office

1. What Constitutes Holding a "Civil Office" by Military Personnel.

We have received several inquiries from Reservists, who have been activated, regarding the restrictions on their holding of civil offices, often elected offices, during their active duty. The following is a brief summary of the Federal law and DoD policy pertaining to the holding of civil office by military personnel:

--Regular officers, and reserve officers serving on active duty under a call or order to active duty for a period in excess of 270 days, may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government). 10 U.S.C. § 973 (b).

--DoD has issued a directive regulating political activities that implements this and other laws by providing policy guidance and procedures governing all members of the Armed Forces on active duty. The directive defines civil office as all nonmilitary offices involving the exercise of the powers or authority of

civil government. DoD Directive 1344.10, June 15, 1990.

--Exceptions are made for reserve officers on active duty for less than 270 days and all enlisted members, if there is no interference with the performance of military duties. In addition, all enlisted members may hold nonpartisan civil office as a notary public or member of a school board or similar local agency, and all officers may serve as members of independent school boards located exclusively on military installations.

--The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office. However, retirement or separation is not an option during periods of national emergency, or when reservists have been called up, such as at the present. In these circumstances, the directive requires members holding a prohibited civil office to decline to serve in the civil office. Failure to do so may result in adverse administrative or disciplinary action. **The directive does not define the term "decline to serve," but DoD has interpreted it to mean the member must refuse to perform any civil functions, or otherwise to take any act in furtherance of their civil office responsibilities or duties. DoD defers to other Federal, state, and local civil authorities, as appropriate, on the question of whether members must resign from prohibited civil office or whether a leave of absence or similar arrangement while the member is on active duty is sufficient.**

--According to the regulation, retirement or separation is also not an option and the member must decline to serve in the civil office when the member is:

--Obligated to fulfill an active duty (AD) service commitment.

--Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile fire pay area.

--Ordered to remain on AD while the subject of an investigation or inquiry.

--Accused of an offense under the UCMJ or serving a sentence or punishment for such offense.

--Pending administrative separation action or proceedings.

--Indebted to the United States.

--In violation of an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

2. End of the Year Matters.

OGE Annual Questionnaire: The Annual Office of Government Ethics Questionnaire must be completed and returned to the Office of Government Ethics (OGE) by February 1, 2003. The Questionnaire is available at the OGE web site: www.usoge.gov.

Annual Training Plan: Each agency must prepare its written annual ethics training plan for 2003 by December 31, 2002, and retain it with its training records. (5 C.F.R. 2638.706).

Jeff Green
Senior Attorney
DoD Standards of Conduct Office

Nos. 16-961, 16-1017, and 16-1423

In the Supreme Court of the United States

NICOLE A. DALMAZZI, PETITIONER

v.

UNITED STATES OF AMERICA

LAITH G. COX, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

KEANU D. W. ORTIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 10 U.S.C. 973(b), which provides that, except as "otherwise authorized by law," a military officer may not hold a "civil office" that requires a presidential appointment with Senate confirmation, prohibits a military officer from serving as a presidentially-appointed judge on the United States Court of Military Commission Review (CMCR).

2. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, bars an individual from serving simultaneously as a presidentially-appointed judge on the CMCR and as an appellate military judge on a service court of criminal appeals.

3. Whether this Court has jurisdiction to review the cases in Nos. 16-961 and 16-1017 under 28 U.S.C. 1259(3).

4. Whether, if this Court does have jurisdiction in Nos. 16-961 and 16-1017, the Court of Appeals for the Armed Forces abused its discretion in denying review in those cases.

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ON WRITS OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

In No. 16-961 (*Dalmazzi*), the opinion of the United States Court of Appeals for the Armed Forces (CAAF) (J.A. 5-10) is reported at 76 M.J. 1. In No. 16-1017 (*Cox*),

the orders of the CAAF (J.A. 26, 38, 43, 100, 105, 119) are reported at 76 M.J. 54 and 76 M.J. 64. In No. 16-1423 (*Ortiz*), the opinion of the CAAF (J.A. 132-143) is reported at 76 M.J. 189.

JURISDICTION

In *Dalmazzi*, the judgment of the CAAF was entered on December 15, 2016. The petition for a writ of certiorari was filed on February 1, 2017. In *Cox*, the judgments of the CAAF were entered on December 27, 2016, and January 17, 2017. The petition for a writ of certiorari was filed on February 21, 2017. In *Ortiz*, the judgment of the CAAF was entered on February 9, 2017, with an opinion issued on April 17, 2017. On April 26, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 9, 2017, and the petition was filed on May 19, 2017. The petitions were granted on September 28, 2017. In *Dalmazzi* and *Cox*, this Court lacks jurisdiction because the Court may not review "any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a); see pp. 41-45, *infra*. In *Ortiz*, the jurisdiction of this Court rests on 28 U.S.C. 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

The petitioners in these consolidated cases are military servicemembers who were convicted of various offenses by military courts-martial. Their convictions and sentences were affirmed, in whole or in part, by the Army and Air Force Courts of Criminal Appeals (CCAs). Petitioners contend that they are entitled to

new hearings before the CCAs because the panels that acted on their appeals included one or more military judges who were also appointed to the United States Court of Military Commission Review (CMCR) by the President, with the advice and consent of the Senate. Petitioners' challenges to the judges' simultaneous service on a CCA and the CMCR arise in the context of the Nation's specialized military justice system, which includes both courts-martial and military commissions.

A. The Court-Martial System

The Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, Cl. 14. Since the Founding, Congress has exercised that authority by providing for the prosecution of offenses committed by military servicemembers in courts-martial rather than in civilian Article III courts. Today, the court-martial system includes three levels of specialized tribunals.

1. The trial-level courts are courts-martial, which may be summary, special, or general. 10 U.S.C. 816. A general court-martial typically consists of a military judge and at least five members. 10 U.S.C. 816(1). A general court-martial has jurisdiction over all offenses under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and may impose sentences up to confinement for life, or death. 10 U.S.C. 818(a) (Supp. IV 2016). Summary and special courts-martial have more limited jurisdiction and impose lesser punishments. 10 U.S.C. 819-820; see *Weiss* v. *United States*, 510 U.S. 163, 167 (1994). If a court-martial issues a conviction, its findings and sentence are reviewed by the officer who convened it, who may in some circumstances set aside a finding of guilt or reduce the sentence. 10 U.S.C. 860 (2012 & Supp. IV 2016).

2. Before 1950, "military courts of appeals did not exist." *United States* v. *Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in part). Instead, "[i]f a service member wanted to challenge a court-martial conviction, he pursued a collateral attack in an Article III court," typically by filing a petition for a writ of habeas corpus. *Id.* at 918-919; see, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 747 (1975).

In 1950, Congress enacted the UCMJ, which established four intermediate appellate courts: the Army, Navy-Marine Corps, Air Force, and Coast Guard CCAs. 10 U.S.C. 866. The CCAs are composed of "appellate military judges," who may be "commissioned officers or civilians." 10 U.S.C. 866(a). Unless the defendant waives review, the relevant CCA is required to review all cases in which the sentence, as approved by the convening authority, includes death, confinement for more than one year, or a punitive discharge. 10 U.S.C. 866(b)(1). The CCAs "may review *de novo* both factual and legal findings." *Weiss*, 510 U.S. at 168; see 10 U.S.C. 866(c).

3. The highest court in the court-martial system is the CAAF.[1] It consists of five civilian judges appointed to 15-year terms by the President with the advice and consent of the Senate. 10 U.S.C. 942(a)-(b) (2012 & Supp. IV 2016). The CAAF must review the record in cases in which a CCA affirms a death sentence and cases in which a Judge Advocate General seeks further review. 10 U.S.C. 867(a)(1)-(2). In all other cases, the CAAF has discretion to grant review upon a petition by the accused. 10 U.S.C. 867(a)(3). When the CAAF grants discretionary review, it need only review the "issues

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[1] Until 1994, the CCAs were called "Courts of Military Review" and the CAAF was called the "United States Court of Military Appeals." *Edmond* v. *United States*, 520 U.S. 651, 653 n.1 (1997).

specified in the grant of review." 10 U.S.C. 867(c). In all cases, its review is limited to issues of law. *Ibid.*

Only a fraction of the cases decided by the CCAs are reviewed on the merits by the CAAF. In fiscal year 2016, for example, the CCAs reviewed a total of 1244 cases. CAAF, *Annual Report* 49, 102, 122, 130 (2016), http://www.armfor.uscourts.gov/newcaaf/annual/FY16AnnualReport.pdf. The CAAF received nine mandatory filings and 719 petitions for discretionary review, of which it granted 66. *Id.* at 17.

4. Until 1983, there was no avenue for direct review of the CAAF's decisions in this Court. See Steven M. Shapiro et al., *Supreme Court Practice* § 2.14, at 129 (10th ed. 2013) (*Supreme Court Practice*). Instead, this Court considered questions related to courts-martial only in habeas proceedings and other collateral challenges brought by the accused. *Ibid.* That was "an unsatisfactory way to manage a system of judicial review," because it meant that there was no way for the United States to seek further review of adverse decisions by the CAAF—including decisions establishing important constitutional precedents or striking down military regulations. S. Rep. No. 53, 98th Cong., 1st Sess. 9 (1983) (Senate Report).

In 1983, in response to a request by the Department of Defense (DOD), Congress redressed that asymmetry by enacting 28 U.S.C. 1259, which grants this Court jurisdiction to review certain CAAF decisions by writ of certiorari. See *The Military Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 19-22, 38-40 (1982) (1982 Hearing) (William H. Taft, IV, Gen. Counsel, DOD). Under Section 1259, this Court has jurisdiction to review the CAAF's decisions

in cases on the CAAF's mandatory docket, cases in which the CAAF "granted a petition for [discretionary] review," and other cases in which the CAAF "granted relief." 28 U.S.C. 1259. But Congress specified that this Court "may not review by a writ of certiorari * * * any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a).

B. The Military-Commission System And The Court Of Military Commission Review

1. The other traditional form of military tribunal is the military commission, which has long been used to substitute for civilian courts in times of martial law or temporary military government, as well as to try members of enemy forces for violations of the laws of war. See *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 595 (2006) (plurality opinion); William Winthrop, *Military Law and Precedents* 831-841 (2d ed. 1920) (Winthrop). The Nation's current system of military commissions under the Military Commissions Act of 2009 (MCA), 10 U.S.C. 948a *et seq.*, is "the product of an extended dialogue among the President, the Congress and [this] Court." *In re al-Nashiri*, 791 F.3d 71, 73 (D.C. Cir. 2015).

After Congress authorized the use of military force to respond to the terrorist attacks on September 11, 2001, the President issued an order providing for the use of military commissions to try noncitizen enemy combatants for certain offenses. *Hamdan*, 548 U.S. at 568. In *Hamdan*, this Court held that those commissions exceeded existing statutory authority. *Id.* at 567. Congress responded by enacting the Military Commissions Act of 2006, 10 U.S.C. 948a *et seq.* (2006), which it later replaced with the MCA.

The MCA "establishes procedures governing the use of military commissions to try alien unprivileged enemy

belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. 948b(a). An alien "unprivileged enemy belligerent" includes an alien who "was a part of al Qaeda at the time of the alleged offense." 10 U.S.C. 948a(7)(C). The procedures for military commissions are "based upon the procedures for trial by general courts-martial under [the UCMJ]," with some exceptions and modifications. 10 U.S.C. 948b(c).

2. The CMCR is "an intermediate appellate tribunal for military commissions akin to each military branch's [CCA] for courts-martial." *al-Nashiri*, 791 F.3d at 74; see 10 U.S.C. 950f. If the convening authority approves a military commission's finding of guilt, the case is referred to the CMCR for review. 10 U.S.C. 950c. The CMCR applies the same standard of review as the CCAs: It "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. 950f(d); see 10 U.S.C. 866(c). The CMCR's decisions are appealable to the D.C. Circuit. 10 U.S.C. 950g.

3. The MCA provides that the Secretary of Defense may "assign persons who are appellate military judges to be judges on the [CMCR]." 10 U.S.C. 950f(b)(2). A person so assigned must be "a commissioned officer of the armed forces." *Ibid.* The MCA specifies that "[n]o appellate military judge on the [CMCR] may be reassigned to other duties" unless the judge voluntarily requests reassignment, retires or otherwise separates from the armed forces, is reassigned "based on military necessity," or is withdrawn from the CMCR "for good cause." 10 U.S.C. 949b(b)(4). The MCA further provides that the President may "appoint, by and with the advice and con-

sent of the Senate, additional judges," who are not required to be military officers. 10 U.S.C. 950f(b)(3); see *al-Nashiri*, 791 F.3d at 74-75.

In practice, the large majority of the CMCR's judges have been military officers who were also serving as appellate military judges on a CCA. *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). Because of the specialized nature of the CMCR's jurisdiction, there are times when "the Court's judges may have very little to do." *Ibid.* "Consistent with that reality, the military judges who serve on the [CMCR] also continue to serve on the [CCAs] from which they are drawn." *Ibid.*

C. The *al-Nashiri* Litigation

1. In November 2014, a military-commission defendant, Abd Al-Rahim Hussein Muhammed al-Nashiri, petitioned the D.C. Circuit for a writ of mandamus seeking disqualification of the military CMCR judges hearing an interlocutory appeal in his case. *al-Nashiri*, 791 F.3d at 73, 75. al-Nashiri contended that the judges were placed on the CMCR in violation of the Appointments Clause, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" the "Officers of the United States," but that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. al-Nashiri argued that CMCR judges are principal officers rather than inferior officers, and that they therefore must be appointed to the CMCR by the President with the advice and consent of the Senate, rather than being assigned by the Secretary of Defense. *al-Nashiri*, 791 F.3d at 75.

The D.C. Circuit denied the mandamus petition, holding that al-Nashiri had not established a "clear and indisputable" right to relief. *al-Nashiri*, 791 F.3d at 85-86. The court did not decide whether CMCR judges are principal officers. *Ibid.* It also did not decide whether, if they are, the Appointments Clause requires judges who have already been appointed as commissioned military officers by the President with the advice and consent of the Senate to be appointed a second time specifically to the CMCR. *Ibid.* The court described those as "open questions." *Id.* at 85. But the court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions" by nominating and confirming the military judges to the CMCR. *al-Nashiri*, 791 F.3d at 86.

2. "The President chose to take that tack" as a prophylactic measure, without conceding it was constitutionally required. *In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016), cert. denied, No. 16-8966 (Oct. 16, 2017). On March 14, 2016, the President submitted nominations to the Senate ratifying the Secretary of Defense's assignments of the appellate military judges serving on the CMCR. Those nominations clarified that, although the judges were being appointed by the President under Section 950f(b)(3), they would continue to be governed by the statutory provisions applicable to "appellate military judges" serving on the CMCR. The President nominated:

> The following named officers for appointment in the grades indicated in the United States Army [or Air Force] as appellate military judges on the [CMCR] under Title 10 U.S.C. Section 950f(b)(3). In accordance with their continued status as appellate military

> judges pursuant to their assignment by the Secretary of Defense under 10 U.S.C. Section 950f(b)(2), while serving on the [CMCR], all unlawful influence prohibitions remain under 10 U.S.C. Section 949b(b).

162 Cong. Rec. S1474 (Mar. 14, 2016).

The nominated judges included Air Force Colonel Martin Mitchell, Army Colonels Larss Celtnieks and James Herring, and Army Lt. Colonel Paulette Burton. 162 Cong. Rec. at S1474. The Senate confirmed their nominations on April 28, 2016. 162 Cong. Rec. S2600. On May 2, 2016, the judges took new oaths of office. J.A. 179, 181, 183, 185. And on May 25, 2016, the President appointed the judges to the CMCR by signing their commissions. J.A. 180, 182, 184, 186.

3. al-Nashiri responded to those developments by seeking to disqualify the military judges on his CMCR panel on a new ground. J.A. 173. He invoked 10 U.S.C. 973(b)(2), which provides that, unless "otherwise authorized by law," a military officer may not hold certain "civil office[s]," including a "civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. 973(b)(2)(A)(ii). al-Nashiri argued that Section 973(b) bars military officers from being appointed as CMCR judges. J.A. 173.

The CMCR denied the motion on two independent grounds. J.A. 170-176. First, it held that military officers are "authorized by law" to serve on the CMCR because 10 U.S.C. 950f(b)(2) specifically provides for military officers to be judges on the court. J.A. 174. Second, the CMCR held that a CMCR judgeship is not a "civil office" for purposes of Section 973(b) because "[d]isposition of violations of the law of war by military commissions is a classic military function." J.A. 175; see J.A. 151-169 (rejecting a similar challenge in another case).

D. The Present Controversy

Petitioners are eight servicemembers who were convicted of a variety of offenses before courts-martial. The CCAs affirmed their convictions and sentences in whole or in part. In each case, the CCA panel included Judge Burton, Judge Celtnieks, Judge Herring, or Judge Mitchell. All petitioners sought discretionary review by the CAAF.

1. Dalmazzi *and* Cox

In *Dalmazzi*, the CAAF granted review to decide whether the President's appointment of Judge Mitchell to the CMCR had rendered him ineligible to continue sitting on the CCA. J.A. 14-15. During briefing, the CAAF noted that the record did not disclose the date of Judge Mitchell's appointment to the CMCR and ordered the parties to submit the relevant documents. J.A. 13. When those documents revealed that Judge Mitchell was not appointed until after the CCA had issued its decision, the CAAF ordered the parties to brief the question "whether the issues granted for review are moot." J.A. 11.

After receiving the parties' briefs, the CAAF "vacated" its order granting review and entered an order stating that the "petition for grant of review is denied." J.A. 10. The CAAF explained that it had granted review to decide "whether a military officer is statutorily or constitutionally prohibited from simultaneously serving" on a CCA and as a presidentially-appointed judge on the CMCR. J.A. 6. The CAAF noted that a presidential appointment is not complete until the President "perform[s] some public act that evinces the appointment," usually by "sign[ing] a commission." J.A. 9-10. And because Judge Mitchell "had not yet been appointed" when the CCA acted, the CAAF stated that the

case was "moot as to [the simultaneous-service] issues" on which it had granted review. J.A. 6, 10.

After denying review in *Dalmazzi*, the CAAF issued similar orders as to all six petitioners in *Cox*, whose CCA panels likewise had issued decisions before the judges were appointed to the CMCR. J.A. 26, 38, 43, 100, 105, 119. As in *Dalmazzi*, each order "vacated" the CAAF's prior order granting discretionary review and "denied" the petition for review. *Ibid.*

2. **Ortiz**

In *Ortiz*, unlike the other cases, the CCA had issued its decision after the President appointed Judge Mitchell to the CMCR. The CAAF therefore decided the simultaneous-service issues on the merits, affirming the CCA's decision. J.A. 132-143.

The CAAF first held that even if a CMCR judgeship were a "civil office" subject to Section 973(b), and even if military officers were not "authorized by law" to serve on the CMCR, any violation of Section 973(b) would not affect Judge Mitchell's service on the CCA. J.A. 139. The CAAF observed that although Section 973(b) prohibits military officers from holding certain civil offices, it does not "operate[] to automatically effectuate [the] termination" of an officer who accepts a prohibited office. *Ibid.* To the contrary, the CAAF noted that language mandating that result had been "repealed over thirty years ago," when Congress rewrote Section 973(b) in 1983. *Ibid.* And the CAAF emphasized that its conclusion was confirmed by a savings clause Congress added when it repealed the automatic-termination language. J.A. 139. That clause provides that "[n]othing in [Section 973(b)] shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5).

The CAAF next held that an officer's simultaneous service on a CCA and the CMCR does not violate the Appointments Clause. J.A. 140-143. The CAAF assumed without deciding that CMCR judges are principal officers. J.A. 142-143. But the CAAF rejected the argument that it would violate the Appointments Clause for Judge Mitchell to serve as a principal officer on the CMCR while separately serving as a CCA judge, which is an inferior office. J.A. 141-142. The court explained that the argument "presum[ed] that [Judge Mitchell's] status as a principal officer on the []CMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." J.A. 141. The CAAF rejected that argument, explaining that "[w]hen [Judge Mitchell] sits as a CCA judge, he is no different from any other CCA judge." *Ibid.*

SUMMARY OF ARGUMENT

I. The President's appointments of Judges Burton, Celtnieks, Herring, and Mitchell to the CMCR did not violate 10 U.S.C. 973(b). And even if they did, petitioners would not be entitled to relief from the CCA decisions affirming their convictions because Congress specifically provided that Section 973(b) does not invalidate the subsequent actions of a military officer who accepts a covered civil office.

A. Section 973(b) states that military officers may not hold certain "civil office[s]" unless they are "authorized by law" to do so. That statute does not bar the President from appointing military officers to the CMCR for two independent reasons.

First, a CMCR judgeship is not a "civil office." The CMCR is a military court modeled on the CCAs. Like the CCAs' review of courts-martial, the CMCR's review of military commissions is a military function that has

long been performed by military officers. Accordingly, just as this Court has held that "the role of military judge [on a CCA] is 'germane' to that of military officer," *Weiss* v. *United States*, 510 U.S. 163, 176 (1994), the role of a military judge on the CMCR is likewise a military position, not a prohibited "civil office."

Second, military officers are authorized by law to serve on the CMCR because Congress provided that the Secretary of Defense may assign "commissioned officer[s]" to be "judges on the [CMCR]." 10 U.S.C. 950f(b)(2). Petitioners deem that authorization insufficient because Section 950f(b)(3), which allows the President to appoint "additional judges to the [CMCR]," does not expressly mention military officers. But petitioners err in presuming that assigned and appointed judges hold two different "offices" for purposes of Section 973(b). By specifying that "[j]udges on the [CMCR] shall be assigned *or* appointed," 10 U.S.C. 950f(b)(1) (emphasis added), Congress made clear that both assigned and appointed judges hold the same office. Congress has thus authorized military officers to hold the single office it created in Section 950f.

B. Even if Section 973(b) prohibited the President from appointing military officers to the CMCR, there would be no basis for petitioners' remarkable assertion that the President's appointment of Judges Burton, Celtnieks, Herring, and Mitchell automatically terminated those judges from the military and voided the CCAs' decisions. Congress repealed language imposing an automatic-termination consequence in 1983 and replaced it with a broad savings clause directing that Section 973(b) may not be "construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5). Here, the judges

decided petitioners' appeals "in furtherance of [their] assigned official duties" on the CCAs. The savings clause thus unambiguously forecloses petitioners' attempt to invoke Section 973(b) to "invalidate" the CCAs' decisions.

II. A military officer's simultaneous service on a CCA and the CMCR does not raise questions under the Appointments Clause or the Commander-in-Chief Clause. Petitioners identify nothing in the text or history of the Appointments Clause, or in this Court's decisions, to support their assertion that the Clause imposes an ill-defined "incompatibility" or "incongruity" limitation on the circumstances in which an individual may hold two separate federal offices. And even if such a limit existed, it would not be implicated here. A military judge's simultaneous service on a CCA and the CMCR is no more "incongruous" or "incompatible" than a district judge's service on the Foreign Intelligence Surveillance Court or a circuit judge's service on a three-judge district court. And petitioners' argument that the Commander-in-Chief Clause does not permit the restrictions on removal that petitioners assume are triggered by presidential appointment to the CMCR rests on the erroneous premise that Judges Burton, Celtnieks, Herring, and Mitchell are not subject to 10 U.S.C. 949b(b)(4), the statutory provision governing reassignment of military judges serving on the CMCR.

III. This Court lacks jurisdiction in *Dalmazzi* and *Cox*, but has jurisdiction in *Ortiz*.

A. Under 28 U.S.C. 1259(3), this Court's jurisdiction is limited to cases in which the CAAF "granted a petition for review." Section 1259(3) does not apply in *Dalmazzi* and *Cox* because the CAAF "vacate[d]" its orders granting review and "denied" the petitions. J.A. 10. That understanding is confirmed by 10 U.S.C.

867a(a), which expressly provides that this Court may not review "any action" by the CAAF "in refusing to grant a petition for review."

B. An amicus brief filed by Professor Bamzai argues that Section 1259 is an unconstitutional expansion of this Court's original jurisdiction and that the Court therefore lacks jurisdiction in all three cases. That is not correct. Congress has validly granted this Court appellate jurisdiction to review the decisions of the non-Article III courts Congress has created under its broad authority over federal territories and the District of Columbia. For the same reason, Section 1259 is a valid grant of appellate jurisdiction over the decisions of the CAAF—a court created pursuant to Congress's comparably broad authority to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14.

IV. If the Court concludes that it has jurisdiction in *Dalmazzi* and *Cox*, it should not disturb the CAAF's discretionary denials of review. The CAAF did not abuse its discretion in vacating its grants of review and denying the petitions in those cases when it discovered that the questions it had agreed to decide were not squarely presented.

ARGUMENT

I. PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER 10 U.S.C. 973(b)

Petitioners' principal claim rests on 10 U.S.C. 973(b), which provides that military officers may not hold certain "civil office[s]" unless they are "authorized by law" to do so. Petitioners assert that although Congress authorized military officers to be *assigned* to the CMCR by the Secretary of Defense, Section 973(b) bars the same military officers from being *appointed* to the

CMCR by the President. Petitioners further assert that when the President appointed Judges Burton, Celtnieks, Herring, and Mitchell, Section 973(b) automatically terminated them from the military and rendered them ineligible to serve on the CCA panels that decided petitioners' appeals.

Both steps of petitioners' argument are unsound. Section 973(b) does not prohibit military officers from serving on the CMCR because a CMCR judgeship is not a "civil office" within meaning of Section 973(b), and because military officers are in any event "authorized by law" to serve on the court. And even if that were not so, nothing in Section 973(b) supports petitioners' assertion that officers who accept covered civil offices are automatically terminated from the military, voiding their subsequent actions. In seeking that startling result, petitioners ask this Court to re-impose a consequence that Congress deleted from the statute in 1983 and to ignore Congress's express directive that Section 973(b) may not "be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5).

A. Section 973(b) Does Not Prohibit Military Officers From Serving On The CMCR

Congress created the CMCR as a military court, patterned after the CCAs, and it specifically authorized the Secretary of Defense to assign military officers to be CMCR judges. When the D.C. Circuit suggested that the officers' assignments to the CMCR raised questions under the Appointments Clause, the President and the Senate acted to eliminate those questions by nominating and confirming the officers to the same positions. The officers did not violate Section 973(b) by accepting the President's appointments.

1. A CMCR judgeship is not a "civil office" within the meaning of Section 973(b)

a. The bar to civil office-holding now codified at 10 U.S.C. 973(b) was first enacted in 1870. In its original form, it imposed a broader prohibition and carried the draconian consequence of automatic termination from the military upon acceptance of a civil office:

> [I]t shall not be lawful for any officer of the army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.

Act of July 15, 1870, ch. 294, § 18, 16 Stat. 319 (1870 Act).

In enacting that provision, Congress sought to "assure civilian preeminence in government" by preventing "the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975). For example, one Senator explained that "the theory of our Government is that the military should be separate from and subordinate to the civil authority." Cong. Globe, 41st Cong., 2d Sess. 3398 (1870) (Sen. Williams). Another observed that "civil offices of the country" should not be "administered by the military authorities." *Id.* at 3395 (Sen. Trumbull).[2]

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[2] See Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to William P. Tyson, Director, Executive Office for United States Attorneys, *Re: Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 9-17 (May 17, 1983) (Olson Mem.) (summarizing legislative history), https://www.justice.gov/olc/page/file/965131/download.

Congress carried forward the 1870 statute's basic prohibition, with minor amendments, for the next century. Olson Mem. 16 n.22. In 1968, the prohibition was codified as Section 973(b) and expanded to reach all military officers, not just those in the Army. Act of Jan. 2, 1968, Pub. L. No. 90-235, § 4(a)(5), 81 Stat. 759. Over the years, Congress also enacted a variety of statutes authorizing military officers to hold specific civil offices notwithstanding the general prohibition. Olson Mem. 16-17 n.21 (collecting statutes).

In 1983, the Office of Legal Counsel (OLC) concluded that Section 973(b) prohibited the "widespread" practice of appointing military lawyers to be Special Assistant U.S. Attorneys in the Department of Justice so that they could prosecute petty civil crimes on military reservations. Olson Mem. 1-3, 5-6. OLC concluded that the lawyers were performing a "civil" function because they were prosecuting "offenses against the civil laws of the United States" and acting under the authority of "the Attorney General" rather than any "military source." *Id.* at 29; see *id.* at 7.

Congress responded to OLC's determination by "completely rewrit[ing]" Section 973(b). S. Rep. No. 174, 98th Cong., 1st Sess. 233 (1983); see Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, Tit. X, Pt. A, § 1002, 97 Stat. 655-656 (1983 Amendment). Section 973(b) now provides that "[e]xcept as otherwise authorized by law," a military officer "may not hold, or exercise the functions of, a civil office in the Government of the United States" that is "an elective office," that "requires an appointment by the President by and with the advice and consent of the Senate," or that is in the Executive Schedule set forth in 5 U.S.C. 5312-5317. 10 U.S.C. 973(b)(2)(A). Section 973(b) also generally

prohibits military officers from holding a "civil office" in a state or local government. 10 U.S.C. 973(b)(3).

Because Section 973(b) does not define "civil office," that term must be construed "in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). In this context, the natural meaning of "civil" is "non-military." 3 *Oxford English Dictionary* 255 (2d ed. 1989); see, *e.g.*, Robert Gordon Latham, *A Dictionary of the English Language* 252 (1876) ("not military"); James Stormonth, *A Dictionary of the English Language* 169 (1895) ("ordinary life as distinguished from military"). That natural meaning accords with Section 973(b)'s purpose of preserving the "separation of the military and civilian establishment[s]." Olson Mem. 16. DOD has adopted the same understanding in exercising its authority to "prescribe regulations to implement" Section 973. 10 U.S.C. 973(d). Under those regulations, a "civil office" is "[a] non-military office involving the exercise of the powers or authority of civil government." DOD Directive No. 1344.10 § E2.3 (Feb. 19, 2008) (Directive 1344.10) (App., *infra*, 19a-23a).

b. A CMCR judgeship is not a "civil office" under Section 973(b) because review of military commissions, like review of courts-martial, is a military function. This Court has recognized that the use of military commissions to try enemy belligerents is "[a]n important incident to the conduct of war" that "may constitutionally be performed by the *military arm* of the nation in time of war." *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (emphasis added); see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 596-598 (2006) (plurality opinion). "Following the analogy of courts-martial, military commissions in this country have invariably been composed of commissioned offic-

ers." Winthrop 835. And, like courts-martial, convictions before military commissions were traditionally subject to review by the convening officer. *Id.* at 846. Accordingly, as the CMCR explained in *al-Nashiri*, "[d]isposition of violations of the law of war by military commissions is a classic military function." J.A. 175.

Consistent with that tradition, the MCA establishes a system of military commissions to try alien unprivileged enemy belligerents for law-of-war offenses committed in the context of hostilities against the United States. 10 U.S.C. 948b(a)-(b), 948c, 950p(c). The MCA's procedures are "based upon" and largely consistent with the procedures governing general courts-martial under the UCMJ. 10 U.S.C. 948b(c). Like a general court-martial, a military commission is presided over by a "military judge," who must be "a commissioned officer of the armed forces." 10 U.S.C. 948j(a)-(b); see 10 U.S.C. 826(a)-(b). And like a general court-martial, a military commission is composed of between five and 12 "commissioned officers." 10 U.S.C. 948i(a), 948m(a), 949m(c); see 10 U.S.C. 816(1), 825, 825a.

As particularly relevant here, the MCA's "review structure" is "virtually identical to the review system for courts-martial." *In re al-Nashiri*, 835 F.3d 110, 122 (D.C. Cir. 2016), cert. denied, No. 16-8966 (Oct. 16, 2017). "The 'scope of the CMCR's post-conviction review is a word-for-word copy' of the portion of the UCMJ that sets out the authority of each service's [CCA], the military body that reviews court-martial convictions." *Ibid.* (citation omitted); see 10 U.S.C. 866(c)-(d), 950f(d)-(e).

Like their counterparts on the CCAs, therefore, CMCR judges do not exercise "the powers or authority of civil government." Directive 1344.10 § E2.3. And for

the same reason, the presence of military officers on the CMCR poses no threat to "civilian preeminence" in government. *Riddle*, 522 F.2d at 884.

c. This Court's decision in *Weiss* v. *United States*, 510 U.S. 163 (1994), confirms that CMCR judges perform a military function. In *Weiss*, the Court noted that military judges on CCAs are selected by Judge Advocates General, a method that does not itself comply with the Appointments Clause. *Id.* at 168-169. But the Court nonetheless held that the Clause was satisfied because the judges "were already commissioned officers when they were assigned" and thus "had already been appointed by the President with the advice and consent of the Senate" to their military offices. *Id.* at 170.

In so holding, the Court assumed without deciding that the officers' prior appointments would satisfy the Appointments Clause for their new CCA positions only if the duties of a CCA judge were "germane" to their military offices. *Weiss*, 510 U.S. at 173-174. The Court had little difficulty concluding that any germaneness requirement was satisfied, because "all military officers, consistent with a long tradition, play a role in the operation of the military justice system." *Id.* at 174-175. Among other things, officers convene, serve on, and review courts-martial. *Id.* at 175.

The Court's reasoning in *Weiss* applies equally here. Like courts-martial, military commissions are part of the "military justice system" in which "all military officers, consistent with a long tradition, play a role." *Weiss*, 510 U.S. at 175. And just as "the role of military judge is 'germane' to that of military officer" when the judge serves on a CCA, *id.* at 176, it is also germane when the judge serves in a functionally equivalent role on the CMCR. That germaneness to an officer's military role

confirms that a CMCR judgeship is not a "civil office" within the meaning of Section 973(b).

d. Petitioners provide no sound reason to question that conclusion.

First, petitioners assert that opinions by OLC, the Attorney General, and the Comptroller General have adopted a "very broad" interpretation of the term "civil office." Pet. Br. 31 (citation omitted). But those opinions primarily addressed positions that were obviously non-military, and they thus described the breadth of the term "office"—not the meaning of "civil."[3] The Olson Memorandum, for example, readily concluded that "[t]he prosecution of offenses committed by persons not subject to the [UCMJ] seems clearly a 'civil' function," and devoted the bulk of its analysis to determining the meaning of "the statutory term '*office*.'" Olson Mem. 7-8 (emphasis added). Petitioners thus err in reading (Br. 32) the Olson Memorandum to conclude that a "civil office" includes any office that is "established by statute" and that "involve[s] the exercise of 'some portion of the sovereign power.'" Olson Mem. 24. That test

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[3] Petitioners rely (Br. 31 n.19) on a portion of the Olson Memorandum citing opinions addressing Section 973(b) and its predecessors. With one exception discussed below, see p. 24, *infra*, the offices at issue were obviously civil: "park commissioner"; "trustee of the Cincinnati Southern Railway"; member of a city board to report to the mayor "on street paving"; "Indian agents"; work for "the United States Geological Survey"; "duties in connection with World's Columbian Commission"; "President of the Louisiana State University"; "state notary public"; "special policeman for the Library of Congress"; "Commissioner of Roads for Alaska"; manager of a "state highway construction project"; officer with the "United Nations Relief and Relocation Administration"; "civil positions in the Panama Canal Zone"; and commissioner on the "Alaskan Engineering Commission." Olson Mem. 18-24 & nn.23-28.

identifies governmental "offices." But unless it is limited to *non-military* offices, it would sweep in many positions that are military rather than civil—including, for example, the Army Chief of Staff, Vice Chief of Staff, Deputy Chief of Staff, Assistant Chiefs of Staff, Chief of Engineers, and Judge Advocate General. 10 U.S.C. 3033(a)(1), 3034(a), 3035(a), 3036(a)(1)-(2).

An 1893 Attorney General opinion confirms that Section 973(b) does not reach statutory offices performing military functions. The Attorney General was asked whether officers were terminated from the Army upon appointment to the California Débris Commission, a body under the "direction of the Secretary of War." *California Débris Commission—Civil Office*, 20 Op. Att'y Gen. 604, 604 (1893) (citation omitted). In addition to concluding that the statute creating the Commission allowed the appointment of military officers, the Attorney General also determined that because the commissioners "act[ed] under the direction of the Secretary of War" and "belong[ed] to the War Department," "[t]hey d[id] not, within the meaning of [Section 973(b)'s predecessor], hold any civil office." *Id.* at 605. The Attorney General thus concluded that the officers remained members of the Army, "merely detailed upon special duty, although the detail is to be effected by the President and the Senate." *Id.* at 606; see Olson Mem. 20 n.24. The same is true here.[4]

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[4] Petitioners observe (Br. 31) that the Secretaries of the Army, the Navy, and the Air Force hold civil offices even though they perform functions related to the military. But that is because, regardless of their functions, Congress has expressly provided that those officers must be "appointed from civilian life." 10 U.S.C. 3013(a)(1),

Second, petitioners emphasize (Br. 32) that "civilians can (and do) serve as CMCR judges." Petitioners assert (Br. 31) that "even [an office] with military functions" is a "civil office" under Section 973(b) "so long as the office can be held *by* civilians." But that proves too much. It would mean, for example, that a CCA judgeship—a position this Court has deemed "germane" to the position of military officer, *Weiss*, 510 U.S. at 176—is a "civil office" because it can be held by "civilians." 10 U.S.C. 866(a). As it did with CCAs, Congress provided that civilians may serve on the CMCR. 10 U.S.C. 950f(b)(3). But it did not require the President to appoint any particular number of civilians, or any civilians at all, and the large majority of judges on the court have been military officers. *In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). The possibility that a civilian may hold an office with such military functions does not transform it into a prohibited "civil office."

Third, petitioners assert (Br. 33) that the CMCR primarily focuses on "*domestic* law" rather than the law of war or other military matters. That is not correct. The CMCR was established to "review[] decisions of military commissions." 10 U.S.C. 950f(a). The persons subject to trial by military commission are "alien unprivileged enemy belligerent[s]." 10 U.S.C. 948c. The MCA, by its terms, codifies "offenses that have traditionally been triable under the law of war or otherwise triable by military commission." 10 U.S.C. 950p(d). Thus, like

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5013(a)(1), 8013(a)(1) (Supp. IV 2016); see 10 U.S.C. 113(a) (same requirement for the Secretary of Defense).

CCAs, the CMCR hears "matters as to which the expertise of military courts is singularly relevant." *Schlesinger* v. *Councilman*, 420 U.S. 738, 760 (1975).[5]

Fourth, petitioners briefly suggest (Br. 33-34) that the "novelty" of formal appellate review of military commissions means that such review cannot be a military function. The appellate review conducted by the CCAs was likewise a relative innovation, yet this Court did not hesitate to place it in the "long tradition" of military officers "play[ing] a role in the operation of the military justice system." *Weiss*, 510 U.S. at 175. And although formal appellate oversight is new, military officers have long reviewed military-commission proceedings. During and immediately following the Civil War, for example, the Army Judge Advocate General's office reviewed the records of proceedings in 75,992 courts-martial, military commissions, and courts of inquiry and prepared 21,961 reports and opinions. See W. McKee Dunn, *A Sketch of the History and Duties of the Judge Advocate General's Department, United States Army, Washington, D.C.* 15 (1878).[6]

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[5] For example, the central issue in the case on which petitioners rely (Br. 33) was whether conspiracy to commit war crimes could be tried in a law-of-war military commission. *United States* v. *Al Bahlul*, 820 F. Supp. 2d 1141, 1225-1227 (C.M.C.R. 2011) (en banc). Answering that question required examining, among other things, "the deeply rooted history of U.S. military commission trials of the offense of conspiracy." *Bahlul* v. *United States*, 840 F.3d 757, 766-767 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, No. 16-1307 (Oct. 10, 2017).

[6] During World War II, the Army Judge Advocate General continued to review military trials. In certain cases, he was aided by a "board of review consisting of not less than three officers of the Judge Advocate General's Department," which examined the record

2. Military officers are "authorized by law" to serve as CMCR judges

Because a CMCR judgeship is not a "civil office," Section 973(b) would not disable military officers from serving on the court even if Congress had been silent about who is eligible to serve. But Congress was not silent. It specifically provided that "the Secretary of Defense may assign persons who are appellate military judges to be judges on the [CMCR]" and that "[a]ny judge so assigned shall be a commissioned officer of the armed forces." 10 U.S.C. 950f(b)(2). In light of that express authorization, Section 973(b) does not bar military officers from serving as judges on the CMCR for the additional reason that military officers are "authorized by law" to serve in that capacity. 10 U.S.C. 973(b)(2)(A).

a. Petitioners concede (Br. 40) that Section 950f(b)*(2)* "expressly indicate[s]" that military officers may serve as "judges" on the CMCR. But they maintain (Br. 40-41) that similar authorization is absent from Section 950f(b)*(3)*, which allows the President to "appoint, by and with the advice and consent of the Senate, additional judges" to the CMCR. Petitioners' claim thus hinges on the proposition that an "additional judge" appointed under Section 950f(b)(3) and a "judge" assigned under Section 950f(b)(2) hold two different offices.

In fact, Section 950f establishes only one office: "judge[] on the [CMCR]." 10 U.S.C. 950f(a). The Secretary of Defense may assign appellate military judges "to be judges on the [CMCR]," and the President may

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and submitted "its opinion, in writing, to the Judge Advocate General." Act of June 4, 1920, ch. 227, 41 Stat. 797. Although by statute this procedure applied only to general courts-martial, the President directed that it be followed for military commissions convened in the United States during 1945. 10 Fed. Reg. 549 (Jan. 16, 1945).

appoint "additional judges to the [CMCR]." 10 U.S.C. 950f(b)(1)-(3). But by specifying that "[j]udges on the Court shall be assigned *or* appointed," 10 U.S.C. 950f(b)(1) (emphasis added), Congress made clear that both assigned and appointed judges hold the same office —"[j]udge[] on the Court."

The same was true in *Edmond* v. *United States*, 520 U.S. 651 (1997). There, this Court held that judges on the Coast Guard CCA could either be assigned by the Judge Advocate General or appointed by the Secretary of Transportation. *Id.* at 657-658. Under the Appointments Clause, the Judge Advocate General's power to assign applied only to commissioned officers who had previously been appointed by the President with the advice and consent of the Senate, whereas the Secretary's power to appoint extended to civilians. *Ibid.* But despite those two modes of selection, the relevant statute creates only a single office—"appellate military judge[]" on the Coast Guard CCA. 10 U.S.C. 866(a).

b. Petitioners do not deny that *all* CMCR judges—assigned and appointed—are "'substantively identical' in terms of their duties." Br. 41 (citation omitted). Petitioners nevertheless argue (Br. 35-36, 40-41) that assigned and appointed judges hold two different "offices" because they are selected and may be removed via different mechanisms. The mechanisms by which individuals are placed in and removed from an office are highly relevant under the Appointments Clause. See, *e.g.*, *Edmond*, 520 U.S. at 657. But the question here is statutory, not constitutional: it is whether, under Section 972(b), Congress has "authorized by law" military officers to serve in the asserted "civil office." That question is resolved by Congress's decisions (1) to define a single statutory office, "judge[] on the [CMCR]," 10 U.S.C.

950f(a), and (2) to authorize "commissioned officer[s] of the armed forces" to fill that office, 10 U.S.C. 950f(b)(2).

Petitioners speculate (Br. 41) that "Congress may have had very good reasons" to permit military officers to be assigned to be CMCR judges without allowing them to be appointed to the same position. But the reasons petitioners hypothesize are far removed from the purpose of Section 973(b), which was to preserve the separation between civil and military functions and to "assure civilian preeminence in government." *Riddle*, 522 F.2d at 884. If those objectives are not threatened by a military officer's service as a CMCR judge pursuant to an assignment, they also are not threatened when the same officer holds the same office and performs the same functions pursuant to an appointment by the President.

c. Even if removal mechanisms were relevant under Section 973(b), petitioners' arguments would be misplaced here. Petitioners note (Br. 35-36) that Congress specified that an "appellate military judge" serving on the CMCR may be reassigned to other duties under 10 U.S.C. 949b(b)(4).[7] Petitioners also note (Br. 36 n.23) that, although the MCA does not expressly address the issue, the D.C. Circuit has recognized that a *civilian* appointed to the CMCR "may be removed by the President only for cause and not at will"—though the court did not have occasion to elaborate on what would constitute "cause" in this context. *Khadr*, 823 F.3d at 98. But

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[7] Section 949b(b)(4) authorizes reassignment if a judge "voluntarily requests to be reassigned," separates from service, is reassigned by the Secretary of Defense or his designee "based on military necessity," or is withdrawn from the CMCR by the Secretary or his designee "for good cause." 10 U.S.C. 949b(b)(4); see *al-Nashiri*, 791 F.3d at 83-84 ("[W]e would likely give the Executive Branch substantial discretion to determine what constitutes military necessity.").

petitioners err in assuming (Br. 35-36, 41) that, as a result of their presidential appointments, Judges Burton, Celtnieks, Herring, and Mitchell were made removable only under the standard applicable to civilians, and not under the procedures applicable to "appellate military judges" under Section 949b(b)(4). The President's nominations clarified that the judges would have "continued status as appellate military judges" and would remain subject to "Section 949b(b)." 162 Cong. Rec. S1474 (Mar. 14, 2016). The judges' commissions likewise specify that they continue to be "Appellate Military Judges." J.A. 180, 182, 184, 186. Accordingly, notwithstanding their presidential appointments, the judges remained subject to reassignment under Section 949b(b).

* * * * *

When it enacted the MCA in 2009, Congress unambiguously intended for military officers to serve on the CMCR. After the D.C. Circuit concluded that the Secretary of Defense's assignment of military officers to the CMCR raised questions under the Appointments Clause, the President and the Senate heeded the D.C. Circuit's suggestion that they "put to rest any Appointments Clause questions" by "re-nominating and reconfirming the military judges to be *CMCR judges.*" *In re al-Nashiri*, 791 F.3d 71, 86 (2015). This Court should reject petitioners' assertion that Section 973(b) barred that sensible course of action by the Political Branches.[8]

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[8] Petitioners contend (Br. 37-39) that CMCR judges are principal officers and that the Appointments Clause therefore requires that they be appointed to the CMCR by the President with the advice and consent of the Senate. The government took the opposite view in *al-Nashiri*. See *Ortiz* Br. in Opp. 13. But the CAAF did not reach that issue, J.A. 142-143, and this Court likewise need not and should

B. Even If Section 973(b) Prohibited Military Officers From Serving On The CMCR, Congress Expressly Foreclosed The Relief Petitioners Seek

Section 973(b) provides that military officers "may not hold, or exercise the functions of," certain civil offices, but it does not itself prescribe a consequence if an officer accepts an appointment to a covered office. Petitioners nonetheless insist (Br. 42, 49) that the President's appointments of Judges Burton, Celtnieks, Herring, and Mitchell "resulted in their immediate termination from the military—thereby disqualifying them from continuing to serve on the CCAs" and rendering "all CCA decisions in which they participated" after the appointments "void." Congress has foreclosed that result.

1. As originally enacted in 1870, Section 973(b)'s predecessor provided that any officer who accepted a covered civil office would "at once cease to be an officer of the army." 1870 Act, § 18, 16 Stat. 319. The precise language was amended over the next century, but until 1983 the statute continued to direct that "[t]he ac-

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not resolve in these cases any of the "several questions of first impression" implicated by petitioners' contention. *al-Nashiri*, 791 F.3d at 85; see *id.* at 82-85 (surveying the relevant issues). As the foregoing discussion makes clear, petitioners' Section 973(b) claim turns on two questions: (1) whether a CMCR judgeship is a "civil office" within the meaning of Section 973(b); and (2) if so, whether assigned and appointed CMCR judges hold different "offices" for purposes of that statute. Neither of those statutory questions turns on whether CMCR judges are principal officers. And particularly because the President nominated and the Senate confirmed the military judges to the CMCR specifically to obviate the need to answer the constitutional questions the D.C. Circuit identified, this Court should not address those questions here. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

ceptance of such a civil office or the exercise of its functions by such officer terminates his employment." 10 U.S.C. 973(b) (1982).

When Congress amended the statute in 1983, it completely rewrote Section 973(b), "striking out subsection (b) and inserting in lieu thereof" new language. 1983 Amendment, § 1002(a), 97 Stat. 655. The amendment eliminated any provision for the automatic termination of officers who accept a covered civil office.[9] Instead, Congress enacted an express savings clause directing that "[n]othing in [Section 973(b)] shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. 973(b)(5). Congress otherwise left the remedies for violations to the Secretary of Defense, who was authorized to "prescribe regulations to implement" Section 973. 10 U.S.C. 973(d).

The plain language of Section 973(b)(5)'s savings clause unambiguously forecloses the relief petitioners seek. Officers serving as military judges are "assigned to a [CCA]" by the relevant Judge Advocate General. 10 U.S.C. 866(a); see *Weiss*, 510 U.S. at 172. Judges Burton, Celtnieks, Herring, and Mitchell thus decided petitioners' appeals as part of their "assigned official duties." And petitioners' claim (Br. 49) that the asserted violation of Section 973(b) renders the CCAs' decisions "void" is undeniably an attempt to "invalidate"

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[9] Congress had good reason to abandon automatic termination. During the 1970s, some officers opposed to the Vietnam War had used Section 973(b)'s automatic-termination rule as a "legal loophole" that allowed them to escape further service simply by accepting a minor civil office in a state or local government. Lt. John H. Stassen, *Military Administrative Law: The Civil Office Prohibition*, 26 JAG J. 268, 268 n.2 (1972) (citation omitted); see *id.* at 277 & n.51.

the judges' actions in furtherance of those duties. That should end the inquiry. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted).

2. Petitioners do not appear to dispute that a natural reading of Section 973(b)(5) forecloses their claim. But they assert (Br. 47) that Section 973(b)(5) "was only meant to have retroactive effect" and has no application to post-1983 events. Petitioners further assert (*ibid.*) that Section 973(b)(5) prohibits only the invalidation of actions taken in the covered civil office, not those taken in furtherance of an officer's military duties. Nothing in the text supports those limitations, and several features of the statute refute them.

Most obviously, Section 973(b)(5) is not, by its terms, retroactive. Instead, Congress specifically addressed pre-1983 events in a separate, uncodified provision that parallels, and is broader than, Section 973(b)(5):

> Nothing in section [10 U.S.C. 973(b)], as in effect before the date of the enactment of this Act, shall be construed—
>
> (1) to invalidate any action undertaken by an officer of an Armed Force in furtherance of assigned official duties; or
>
> (2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer in furtherance of assigned official duties.

1983 Amendment, § 1002(b), 97 Stat. 655. That parallel uncodified provision specifically addressing pre-1983

events disproves petitioners' assertion that Section 973(b)(5) was intended to have retroactive effect—let alone *exclusively* retroactive effect. Indeed, in light of that provision, petitioners' retroactive-only reading of Section 973(b)(5) would render it superfluous.

There is likewise no merit to petitioners' assertion (Br. 47) that Section 973(b)(5)'s protection for actions taken "in furtherance of assigned official duties" is limited to the officer's actions in the civil office. A military officer's "assigned official duties" plainly include his or her *military* duties—here, service on the CCAs. DOD's implementing regulations confirm that understanding, specifying that "[n]o actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member * * * having held or exercised the functions of a civil office." Directive 1344.10 § 4.6.3.

Finally, petitioners err in suggesting (Br. 46) that if Section 973(b)(5) is interpreted to bar private parties from seeking judicial invalidation of actions taken by officers alleged to have violated Section 973(b), the statute would be deprived "of most of its teeth." In fact, Section 973(b) and its predecessors have been cited in only a handful of judicial decisions, and we are not aware of any case in which a court has relied on those provisions to provide relief to a private party. Cf. Olson Mem. 24. Instead, as the Olson Memorandum illustrates, Section 973(b) has been enforced administratively, in the same manner as countless other regulations of federal personnel that do not give rise to rights enforceable by members of the public.

3. Even if petitioners could clear the hurdle erected by Section 973(b)(5), they would still have to establish that Section 973(b) automatically terminated Judges

Burton, Celtnieks, Herring, and Mitchell from the military upon their acceptance of appointments to the CMCR. In seeking to do so, petitioners acknowledge (Br. 43) that "Congress deleted the automatic termination language from § 973(b)(2) when it amended that provision in 1983." Petitioners provide no valid reason to deny effect to Congress's action.

First, petitioners contend (Br. 42) that the 1983 amendments should not be construed to depart from the "common-law doctrine of incompatibility," under which the holder of an office who accepted an incompatible or forbidden office was deemed to vacate the first office. But even assuming that the doctrine remains viable,[10] the presumption that Congress intends to adhere to common-law rules does not apply "when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Congress's repeal of the automatic-termination provision makes it quite "evident" that Congress intended to abandon that rule. Instead, Congress left it to DOD to determine the appropriate response to violations of Section 973(b). See 10 U.S.C. 973(d). The administrative remedies may include "involuntary discharge or release from active duty." Directive 1344.10 § 4.6.2. But in contrast to the pre-1983 regime, those remedies are now imposed as a

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[10] OLC has applied common-law incompatibility principles—though not the automatic-termination rule—in determining whether an individual may hold two federal offices. See, *e.g.*, *Appointment of Vice Chair of the Fed. Reserve Bd. to Serve Concurrently as Chair of the D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 22 Op. O.L.C. 109, 115-116 (1998). But OLC has also observed that "it is arguable that [the incompatibility doctrine] has either fallen into desuetude or been repealed by statute." *Id.* at 115 n.14 (quoting a 1983 OLC opinion) (brackets omitted).

result of administrative action by DOD rather than automatically upon acceptance of a covered office. *Ibid.*

Second, petitioners note (Br. 43-44, 48-49) that at the same time it amended Section 973(b), Congress enacted a provision specifying that a military officer could accept a position on the Red River Commission. 1983 Amendment, § 1002(d), 97 Stat. 656. In the portion of that provision on which petitioners rely, Congress further specified that, "[n]otwithstanding the provisions of section 973(b)," the officer's acceptance of that position "shall not terminate or otherwise affect such officer's appointment as a military officer." *Ibid.* Petitioners state (Br. 44) that "there would have been no need" for that language if Congress had eliminated the automatic-termination rule. But there would have been no need for that language even *with* an automatic-termination rule. The statute expressly provided that "the President may appoint a regular officer" to the Red River Commission. *Ibid.* Because a military officer is "authorized by law" to hold that position, the appointment would not violate Section 973(b) in the first place.

Third, petitioners argue (Br. 44-45) that the legislative history of the 1983 amendments does not discuss abolition of the automatic-termination rule. But "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 115 (1988).

Fourth, petitioners state (Br. 45 n.25) that "[t]he government's regulations reinforce the conclusion that immediate separation from the military" remains the automatic consequence of a violation of Section 973(b). In fact, those regulations say the opposite. They provide that servicemembers "affected by the prohibitions against * * * exercising the functions of a civil office

may request retirement (if eligible), discharge, or release from active duty," and that the relevant Secretary "*may* approve these requests, consistent with the needs of the Service." Directive 1344.10 § 4.6.1 (emphases added). Termination thus is not automatic upon the acceptance of the prohibited office; it is expressly made discretionary. And the regulation further specifies that a Secretary may not grant a request for retirement or discharge in several circumstances, such as when the servicemember is "[o]bligated to fulfill an active duty service commitment." *Ibid.*[11]

II. SIMULTANEOUS SERVICE ON A CCA AND THE CMCR DOES NOT RAISE CONSTITUTIONAL QUESTIONS

Petitioners sought this Court's review of the question whether "simultaneous service on both the CMCR and [a CCA] violate[s] the Appointments Clause." *Dalmazzi* Pet. i. Petitioners' merits brief all but abandons the Appointments Clause as a freestanding claim, instead arguing (Br. 50-54) that the asserted need to avoid constitutional questions under the Appointments

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[11] Petitioners err in asserting (Br. 8, 45 n.25) that OLC and DOD have taken the position that Section 973(b) automatically terminates the appointment of an officer who accepts a prohibited civil office. The OLC opinion on which petitioners rely addressed the substantive reach of Section 973(b), not the remedy for a violation. *Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. 973(b)(2)(A)*, 40 Op. O.L.C. 1 (2016). The sentence on which petitioners rely was not expressing OLC's view; it was quoting an email from DOD. *Id.* at 3. And while that email stated that Section 973 would "prohibit continuation of military status" after acceptance of a civil office, it did not suggest that Section 973(b) itself would automatically terminate that status. *Ibid.* (citation omitted). The same is true of the 2002 DOD advisory memo (which in any event discussed a now-superseded version of Directive 1344.10).

Clause bolsters their interpretation of Section 973(b). Petitioners also briefly advance an avoidance argument based on the Commander-in-Chief Clause. Those arguments are unpersuasive.

A. Judges Burton, Celtnieks, Herring, and Mitchell were placed in two distinct offices: CCA judge and CMCR judge. As petitioners do not and could not dispute, they were placed in each of those offices in a manner consistent with the Appointments Clause. CCA judges are "inferior Officers." *Edmond*, 520 U.S. at 666. Because military judges are "already commissioned officers" appointed by the President with the advice and consent of the Senate, the Appointments Clause allows them to be assigned to the CCAs without a "second appointment." *Weiss*, 510 U.S. at 170; see *id.* at 176. And even assuming that CMCR judges are principal officers, see note 8, *supra*, the judges have now been appointed to the CMCR by the President with the advice and consent of the Senate. Those appointments "put to rest any Appointments Clause questions." *al-Nashiri*, 791 F.3d at 86.

Petitioners nonetheless contend that it somehow violates the Appointments Clause for a single individual to serve simultaneously as a CCA judge (an inferior office) and as a CMCR judge (a principal office, in petitioners' view). Petitioners assert (Br. 50-52) that simultaneous service on the CMCR and a CCA "might be functionally incompatible" or "incongru[ous]." But petitioners identify nothing in the text or history of the Appointments Clause, or in this Court's decisions, to support their assertion that the Clause imposes such ill-defined "incompatibility" or "incongruity" limits.[12]

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[12] The decisions petitioners do cite are far afield. In *Morrison* v. *Olson*, 487 U.S. 654 (1988), the Court stated that vesting Article III courts with authority to fill an office may be impermissible if there

Even if the Appointments Clause constitutionalized some "incompatibility" or "incongruity" limitation on simultaneous service, it would not be implicated here. The CCAs and the CMCR do not have overlapping jurisdiction, and they do not review each other's decisions. 10 U.S.C. 866, 950f. Placing CCA judges on the CMCR, with its narrower jurisdiction and lighter docket, is analogous to placing Article III judges on specialized Article III courts like the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review. 50 U.S.C. 1803(a)-(b). Simultaneous service on the CCA and the CMCR thus would not violate even the common-law incompatibility principle, which applies only if two offices "have the right to interfere, one with the other," or where one of the offices is "subordinate" to the other. Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 422, at 269-270 (1890) (citation omitted).[13]

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is "some 'incongruity' between the functions normally performed by the courts and their performance of th[at] duty to appoint." *Id.* at 676 (quoting *Ex parte Siebold*, 100 U.S. 371, 398 (1880)). That principle concerns the propriety of a method of appointment—not any "incongruity" in the same individual holding two different offices. In *Nguyen* v. *United States*, 539 U.S. 69 (2003), the Court held that a judge on a territorial court could not sit by designation on a panel of the Ninth Circuit. *Id.* at 71. But the Court relied on a statute requiring that judges sitting by designation be Article III judges—not on the Appointments Clause. *Id.* at 74-76 (citing 28 U.S.C. 292(a)). And in *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225 (2015), Justice Alito's concurring opinion suggested that one of the members of the Board of Amtrak was not appointed in the manner required for a principal officer. *Id.* at 1239-1240.

[13] An individual's simultaneous service in more than one federal office is not uncommon. The Constitution prohibits Members of Congress from "holding any Office under the United States," U.S.

Petitioners appear to contend (Br. 51) that the problem with simultaneous service is that other judges on the CCAs might be "unduly influenced by" the status of Judges Burton, Celtnieks, Herring, and Mitchell as (assumed) principal officers on the CMCR. But as the CAAF explained, that argument erroneously "presumes that [a judge's] status as a principal officer on the []CMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." J.A. 141. "That is not the case." *Ibid.* "When [such a judge] sits as a CCA judge, he is no different from any other CCA judge." *Ibid.*

Nor is there any general principle that a multimember adjudicative body may not be composed of members who have differing status in other contexts. CCA panels can be composed of judges who hold different military ranks. The original Circuit Courts consisted of Justices of this Court sitting with district judges. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 74-75. Today, three-judge district courts include both district

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Const. Art. I, § 6, Cl. 2, but does not otherwise limit dual office-holding. Following the repeal of a statute barring individuals from holding multiple federal offices, OLC has "repeatedly concluded that 'there is no longer any prohibition against dual office-holding'" within the Executive Branch. *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 212 (2002) (citation omitted); see *ibid.* (citing seven prior opinions). Thus, for example, OLC concluded that the same individual could "serve simultaneously as the Director of the Office of Government Ethics and Chief Judge of the Court of Veterans Appeals." *Dual Office of Chief Judge of Court of Veterans Appeals and Dir. of the Office of Gov't Ethics*, 13 Op. O.L.C. 241, 241 (1989). And this Court has concluded that the Constitution "contains no prohibition against the service of active federal judges" on the Sentencing Commission, relying in part on a history of extrajudicial service dating to the Founding. *Mistretta* v. *United States*, 488 U.S. 361, 398 (1989); see *id.* at 398-401.

and circuit judges. 28 U.S.C. 2284(b)(1). And both district judges and retired Justices of this Court sit by designation on panels of the courts of appeals. 28 U.S.C. 292(a) and (d), 294(a).

B. Petitioners also briefly suggest (Br. 53-54) that it could raise questions under the Commander-in-Chief Clause if military officers could be appointed to the CMCR, where, in petitioners' view, they could be removed only for inefficiency, neglect of duty, or malfeasance. As previously explained, however, that argument rests on a mistaken premise: Judges Burton, Celtnieks, Herring, and Mitchell remained subject to the reassignment provisions in 10 U.S.C. 949b(b) even after their appointments. See pp. 29-30, *supra*. Petitioners do not contend that the restrictions on reassignment in Section 949b(b) impinge on the President's authority as Commander in Chief.

III. THIS COURT LACKS JURISDICTION IN *DALMAZZI* AND *COX*, BUT HAS JURISDICTION IN *ORTIZ*

A. This Court Lacks Jurisdiction In *Dalmazzi* And *Cox* Because Section 1259(3) Does Not Authorize Review Of The CAAF's Denial Of Discretionary Review

In granting certiorari, this Court directed the parties to brief the question whether it has jurisdiction in *Dalmazzi* and *Cox*. J.A. 1. The Court lacks jurisdiction in those cases because the CAAF ultimately denied the petitions for discretionary review.

1. The CAAF granted review in *Dalmazzi* and *Cox* to decide constitutional and statutory questions arising from a military officer's simultaneous service on a CCA and as a presidentially-appointed judge on the CMCR. J.A. 14-15, 27-28, 39-40, 44, 101-102, 106-107, 120-121. When it became clear that Judges Burton, Celtnieks, Herring, and Mitchell had not actually been appointed

to the CMCR until after the CCAs issued their decisions, the CAAF vacated its grants of review and denied the petitions because the cases were "moot as to [the simultaneous-service] issues" on which it had granted review. J.A. 10; see J.A. 26, 38, 43, 100, 105, 119.

Petitioners seek this Court's review of those orders under Section 1259(3), which confers jurisdiction in "[c]ases in which the [CAAF] granted a petition for review." But the CAAF "vacate[d]" its orders granting review and then "denied" the petitions. J.A. 10, 26, 38, 43, 100, 105, 119. As a result, *Dalmazzi* and *Cox* are no longer cases in which the CAAF "granted a petition for review" within the meaning of Section 1259(3). That understanding is confirmed by a related provision, which precludes this Court's review of "any action" by the CAAF "in refusing to grant a petition for review":

> Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in [28 U.S.C. 1259]. The Supreme Court may not review by a writ of certiorari under this section *any action* of the [CAAF] in refusing to grant a petition for review.

10 U.S.C. 867a(a) (emphasis added). By its plain terms, Section 867a(a)'s preclusion of review applies here because the CAAF ultimately denied—*i.e.*, "refus[ed] to grant"—the petitions.

2. Although we highlighted Section 867a(a) at the certiorari stage (*Dalmazzi-Cox* Br. in Opp. 10-11), petitioners do not cite it—let alone attempt to reconcile their position with its plain text. The arguments petitioners do advance are unpersuasive.

First, petitioners argue (Br. 25) that these cases fall within Section 1259(3)'s literal terms because the CAAF

initially "granted a petition for review." But petitioners do not appear to deny that the CAAF had authority to reconsider its orders granting review. That authority flows from the principle that a court "ordinarily has the power to modify or rescind its orders at any point prior to final judgment." *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016). And once the CAAF exercised that authority and vacated its orders granting review, these cases ceased to be "[c]ases in which the [CAAF] granted a petition for review."

Courts of appeals have reached the same conclusion under 28 U.S.C. 1292(b), which confers jurisdiction over an interlocutory appeal if the district court enters an order certifying that the statutory standard is met. When a district court initially enters the required order but then withdraws it before the court of appeals takes jurisdiction, the withdrawal "destroys [the court of appeals'] jurisdiction." *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* v. *Whitaker*, 841 F.3d 730, 732 (7th Cir. 2016); accord *City of L.A., Harbor Div.* v. *Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001). The same principle applies here.

Second, petitioners contend (Br. 25-26) that the context and legislative history of Section 1259(3) support their interpretation. In fact, the opposite is true. When DOD proposed what is now Section 1259, it explained that the statute would "preclud[e] direct Supreme Court review in cases where the [CAAF] declined to exercise its discretionary jurisdiction." 1982 Hearing 39 (William H. Taft, IV, Gen. Counsel, DOD). The Chief Judge of the CAAF thus recognized that, if the proposal were enacted, the CAAF "would hold the key allowing access to the Supreme Court." *Id.* at 136 (Chief Judge

Robinson O. Everett, CAAF). The Senate Report echoed the same point, noting that "the number of cases which reach the Supreme Court" would be "dependent on the frequency with which the [CAAF] grants an accused's petition for review." Senate Report 34.

Petitioners could not contend that this Court would have jurisdiction if the CAAF had noted the date of the judges' appointments *before* it granted the petitions and then issued exactly the same written decision denying review at the outset. Petitioners identify no sound reason why this Court's jurisdiction should turn on the fortuity of whether the CAAF notes such a defect before or after it grants a petition for review. To the contrary, just as this Court would have no ready criteria by which to review the CAAF's initial denials of discretionary review, it is equally unclear what standards it would apply to the CAAF's discretionary decision to deny review in a case in which it initially granted a petition.[14]

Third, petitioners contend (Br. 26) that the government's position here is inconsistent with its position in *United States* v. *Denedo*, 556 U.S. 904 (2009). That is not so. *Denedo* involved Section 1259(4), which gives this Court jurisdiction over cases "in which the [CAAF] granted relief." The government argued, and this

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[14] Petitioners speculate (Br. 25-26) that the CAAF could seek to insulate its decisions from this Court's review by purporting to deny review in cases in which it issued opinions resolving the merits. But petitioners do not and could not contend that there was any such evasion here. The CAAF denied the petitions in *Dalmazzi* and *Cox*, but it promptly resolved the relevant questions in *Ortiz*, the first case in which they were squarely presented. And petitioners err in impugning (Br. 26) the CAAF's practice in other cases of denying or dismissing petitions for review when, "after granting review, [it] concludes that it lacks jurisdiction." Like any court, the CAAF is powerless to act on the merits of a case if it lacks jurisdiction.

Court held, that a CAAF decision reversing a CCA's denial of a petition for a writ of *coram nobis* and remanding for further proceedings "granted relief" within the meaning of Section 1259(4). *Denedo*, 556 U.S. at 909. These cases involve a different provision with materially different language.

Finally, there is no merit to petitioners' assertion (Br. 27) that interpreting Section 1259(3) to preclude review here "would raise serious constitutional concerns." Until 1983, this Court had *no* jurisdiction to review the CAAF's decisions directly. See pp. 5-6, *supra*. Here, it is undisputed that this Court would lack jurisdiction if the CAAF had denied review at the outset. If there is no constitutional concern in those circumstances, there is likewise no constitutional problem in Congress's foreclosure of review here.

B. This Court Has Jurisdiction In *Ortiz* Because 28 U.S.C. 1259 Is A Valid Grant Of Appellate Jurisdiction

An amicus brief filed by Professor Bamzai argues (Br. 11-33) that Section 1259 is an unconstitutional expansion of the Court's original jurisdiction—which would mean that this Court lacks jurisdiction in *Ortiz* as well, and that it likewise lacked jurisdiction in each of the nine cases it has previously reviewed under Section 1259.[15] That is not correct. Section 1259 is a valid grant of appellate jurisdiction, and this Court therefore has jurisdiction in *Ortiz*.

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[15] *Denedo*, 556 U.S. 904; *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999); *United States* v. *Scheffer*, 523 U.S. 303 (1998); *Edmond*, 520 U.S. 651; *Loving* v. *United States*, 517 U.S. 748 (1996); *Ryder* v. *United States*, 515 U.S. 177 (1995); *Davis* v. *United States*, 512 U.S. 452 (1994); *Weiss*, 510 U.S. 163; *Solorio* v. *United States*, 483 U.S. 435 (1987).

1. Article III grants this Court original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party," and provides that "[i]n all other cases" the Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. Art. III, § 2, Cl. 2. It has been settled since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that Congress may not expand the original jurisdiction conferred by Article III. In that case, the Court famously held that to issue a writ of mandamus requiring an Executive Branch officer to deliver a commission would be "to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction." *Id.* at 175-176. The Court explained that "the essential criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Id.* at 174.

2. Judged by that criterion, this Court's review of the CAAF's decisions under Section 1259 is appellate, not original. A writ of certiorari to the CAAF "revises and corrects the proceedings in a cause already instituted," *Marbury*, 5 U.S. at 174—specifically, a criminal proceeding in a specialized system of military courts that have been recognized since the Founding as competent to try and punish offenses by servicemembers.

The court-martial "is older than the Constitution." 1 David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1-6(B), at 38-39 (9th ed. 2015). Indeed, the *Federalist Papers* discuss "trials by courts-martial" under the Articles of Confederation. *The Federalist No. 40*, at 250 (Madison) (Clinton Rossiter ed., 1961). The Constitution authorized Congress to carry

forward the court-martial system by empowering it to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. And by exempting "cases arising in the land or naval forces," the Fifth Amendment's Grand Jury Clause contains a "recognition and sanction of an existing military jurisdiction," Winthrop 48 (emphasis omitted).

This Court has long recognized that those constitutional provisions "show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations," and that its power to do so is "entirely independent" of Article III. *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858). The Court has thus held that the judgments of a properly constituted court-martial, acting within its jurisdiction, "rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals." *Ex parte Reed*, 100 U.S. 13, 23 (1879). "The valid, final judgments of military courts, like those of any court of competent jurisdiction * * * , have res judicata effect." *Councilman*, 420 U.S. at 746. They are likewise given effect under the Double Jeopardy Clause. *Grafton* v. *United States*, 206 U.S. 333, 345 (1907).

The Constitution's broad grant of authority to Congress to "make rules for the government of the military" does not "freeze court-martial usage at a particular time." *Solorio* v. *United States*, 483 U.S. 435, 446 (1987). "Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system." *Weiss*, 510 U.S. at 174. In so doing, it has established "an integrated system of military courts and review procedures." *Councilman*,

420 U.S. at 758. That system has broad jurisdiction over offenses committed by servicemembers, including offenses unconnected with military service. 10 U.S.C. 802(a), 805; see *Solorio*, 483 U.S. at 449-451. As a result, courts-martial exercise jurisdiction that overlaps with the criminal jurisdiction of federal and state courts. See *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2508-2509 & n.2 (2013) (Alito, J., concurring in the judgment). And the decisions of courts-martial are reviewed by the CCAs and by the CAAF, a court composed of civilian judges appointed for fixed terms and removable only for specified causes. 10 U.S.C. 942(b)(1) and (c).

3. Professor Bamzai argues that because the CAAF is an Article I tribunal located "within the Executive Branch," *Edmond*, 520 U.S. at 664 n.2, any review of the CAAF's decisions is original rather than appellate. But as Professor Bamzai acknowledges (Br. 23-26), this Court's appellate jurisdiction is not limited to reviewing the proceedings of Article III courts. The Court also exercises appellate jurisdiction over state courts, 28 U.S.C. 1257, and the non-Article III courts Congress has established for federal territories and the District of Columbia, 28 U.S.C. 1257(b), 1258, 1260.

This Court upheld the exercise of appellate jurisdiction over non-Article III territorial courts in *United States* v. *Coe*, 155 U.S. 76 (1894). The Court explained that Congress's plenary authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. Art. IV, § 3, Cl. 2, authorizes it to establish non-Article III "legislative courts" for the territories. *Coe*, 155 U.S. at 85; see *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828). And the Court concluded that "the judicial action of all inferior courts

established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government." *Coe*, 155 U.S. at 86.

This Court has likewise held that Congress's power "[t]o exercise exclusive legislation in all cases whatsoever" over the District of Columbia, U.S. Const. Art. I, § 8, Cl. 17, authorizes it to establish non-Article III courts for the District. *Palmore* v. *United States*, 411 U.S. 387, 410 (1973). The Court explained that "the requirements of Article III * * * must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.* at 408.

The system of courts-martial Congress has established under Article I, § 8, Cl. 14, stands on similar footing. "It too involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 66 (1982) (plurality opinion); see *ibid.* ("The situation [with respect to courts-martial] strongly resembles the situation with respect to territorial courts."). Indeed, the Court in *Palmore* identified the court-martial system as one of the "specialized areas having particularized needs" where Congress has permissibly created non-Article III courts. 411 U.S. at 408; see *id.* at 404 (describing courts-martial as "another context in which criminal cases arising under federal statutes are tried, and defendants convicted, in non-Art. III courts").

Accordingly, just as the decisions of the territorial courts "may, in accordance with the Constitution, be

subjected to the appellate jurisdiction" of this Court, *Coe*, 155 U.S. at 86, Congress may grant this Court appellate jurisdiction to review the CAAF's decisions. And because courts-martial, like territorial courts, "are unique historical exceptions" to Article III grounded in "other provisions of the Constitution," *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1964 (2015) (Thomas, J., dissenting), this Court can uphold Section 1259 without deciding whether Congress could confer jurisdiction on the Court to review directly the decisions of other non-Article III tribunals, such as those that adjudicate matters of "public rights," *ibid.* See Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 576 (2007) ("Like territorial courts, of course, [courts-martial] act upon core private rights to person and property.").

4. Professor Bamzai observes (Br. 14-17) that in a line of cases beginning with *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), this Court has held or stated that it lacks jurisdiction to review the decisions of military commissions. But those cases, including *Vallandigham*, noted the absence of *statutory* jurisdiction. See *Vallandigham*, 68 U.S. at 251. Accordingly, just a few years before Congress enacted Section 1259, this Court cited *Vallandigham* and several of the other decisions on which Professor Bamzai relies as standing for the proposition that Congress has "never deemed it appropriate to confer on this Court 'appellate jurisdiction to supervise the administration of criminal justice in the military'"—not the far more sweeping proposition that Congress *could not* confer such jurisdiction. *Councilman*, 420 U.S. at 746 (citation omitted).

To be sure, the Court's opinion in *Vallandigham* also indicated that review in that case would have been inconsistent with Article III. See 68 U.S. at 252-253. But the military commission at issue there was not a court established by Congress; it was, instead, created on the authority of a commanding general, who conducted the only review of its findings and sentence. *Id.* at 243-244, 247-248. As a result, the writ of certiorari sought was to be directed to the Army Judge Advocate General, not to any tribunal. *Id.* at 243. And in concluding that the military commission was not of a "judicial character," the Court relied in part on *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852), which held that a district judge was not acting in a judicial capacity when he rendered decisions subject to review by the Secretary of the Treasury. *Id.* at 47-48; see *Vallandigham*, 68 U.S. at 253. The CAAF, in contrast, is a court established by Act of Congress in the system of military justice recognized by the Constitution, and its decisions are of the same judicial character as those of the territorial courts and the District of Columbia Court of Appeals.[16]

IV. EVEN IF THIS COURT HAS JURISDICTION IN *DALMAZZI* AND *COX*, IT SHOULD NOT DISTURB THE CAAF'S DISCRETIONARY DENIALS OF REVIEW

Even if this Court concludes that it has jurisdiction in *Dalmazzi* and *Cox*, it should not disturb the CAAF's denial of review in those cases. As petitioners do not dispute, the CAAF had discretion to grant or deny the

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[16] The judges of the CAAF are removable by the President for specified causes. 10 U.S.C. 942(c). But judges on territorial courts have likewise been removable by the President. See *Shurtleff* v. *United States*, 189 U.S. 311, 316 (1903); *Kuretski* v. *Commissioner*, 755 F.3d 929, 941 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 2309 (2015).

petitions for review. 10 U.S.C. 867(a)(3). At most, therefore, this Court could review the CAAF's action for "abuse of discretion." *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014) (citation omitted). The CAAF did not abuse its discretion in denying review in *Dalmazzi* and *Cox* after it discovered that the questions it had agreed to decide were not presented. This Court, too, has dismissed writs of certiorari as improvidently granted when it becomes apparent that the question on which it granted review is not cleanly presented. See *Supreme Court Practice* § 5.15, at 360-361.

Petitioners contend (Br. 27-28) that the CAAF erred in describing its denial of review in *Dalmazzi* as a matter of "mootness." But as the context makes clear—and as petitioners acknowledge (Br. 28)—the CAAF's statement that the case was "moot as to th[e] issues" on which it had granted review was not meant to convey that the case was moot in the Article III sense. J.A. 10. Instead, it reflected the CAAF's conclusion that the case did not actually present the relevant issues. The CAAF's use of colloquial language in expressing that conclusion furnishes no basis for review.

Petitioners also contend (Br. 28-29) that the petitioners in *Dalmazzi* and *Cox* have valid claims under Section 973(b) even though Judges Burton, Celtnieks, Herring, and Mitchell were not appointed to the CMCR until after they acted on the appeals in those cases. Petitioners observe (Br. 29) that Section 973(b) provides that an officer may not "hold, or exercise the functions of," a prohibited civil office, 10 U.S.C. 973(b)(2)(A), and they argue that the judges "exercise[d] the functions" of a CMCR judge even before their appointments.

Even if that argument were correct, it would not establish an abuse of discretion.[17] The CAAF was presented with the same argument. See *Dalmazzi* CAAF Supp. Br. 8. But it did not address that argument, and did not otherwise resolve the merits of the statutory and constitutional challenges in *Dalmazzi* and *Cox*. Instead, it denied discretionary review—perhaps because it concluded that the applicability of Section 973(b) during the four weeks between the judges' confirmation and their appointments lacked sufficient continuing importance to warrant an exercise of its discretionary jurisdiction. In taking that step, the CAAF acted well within its discretion.

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[17] Petitioners' argument is not, in fact, correct. It is true enough that Judges Burton, Celtnieks, Herring, and Mitchell exercised the functions of a CMCR judge before their appointments. But that is because they had previously been assigned to the CMCR by the Secretary of Defense. Petitioners acknowledge (Br. 41) that the functions of assigned and appointed judges are "'substantively identical' in terms of their duties." Br. 41 (citation omitted). Thus, even if petitioners' reading of Section 973(b) were otherwise correct, the statute would not have been implicated until the President actually appointed the judges to the CMCR. Until then, the judges were "exercis[ing] the functions" of their previously assigned positions.

CONCLUSION

In *Dalmazzi* and *Cox*, the writs of certiorari should be dismissed for lack of jurisdiction. In *Ortiz*, the judgment of the CAAF should be affirmed.

Respectfully submitted.

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APPENDIX A

1. U.S. Const. Art. I, § 8 provides in pertinent part:

The Congress shall have Power * * *

[14] To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

2. U.S. Const. Art. II, § 2, Cls. 1-2 provide:

[1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Office in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. U.S. Const. Art. III, § 2, Cls. 1-2 provide:

[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

4. 10 U.S.C. 866 provides:

Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military

judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sen-

tence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted,

to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

5. 10 U.S.C. 867 provides:

Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused,

that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

6. 10 U.S.C. 867a provides:

Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any

action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

7. 10 U.S.C. 949b(b) provides:

Unlawfully influencing action of military commission and United States Court of Military Commission Review

(b) UNITED STATES COURT OF MILITARY COMMISSION REVIEW.—(1) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

8. 10 U.S.C. 950f provides:

Review by United States Court of Military Commission Review

(a) ESTABLISHMENT.—There is a court of record to be known as the "United States Court of Military Commission Review" (in this section referred to as the "Court"). The Court shall consist of one or more panels, each composed of not less than three judges on the Court. For the purpose of reviewing decisions of military commissions under this chapter, the Court may sit in panels or as a whole, in accordance with rules prescribed by the Secretary of Defense.

(b) JUDGES.—(1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.

(2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.

(3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

(4) No person may serve as a judge on the Court in any case in which that person acted as a military judge, counsel, or reviewing official.

(c) CASES TO BE REVIEWED.—The Court shall, in accordance with procedures prescribed under regulations of the Secretary, review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused.

(d) STANDARD AND SCOPE OF REVIEW.—In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by the convening authority. The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

(e) REHEARINGS.—If the Court sets aside the findings or sentence, the Court may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Court sets aside the findings or sentence and does not order a rehearing, the Court shall order that the charges be dismissed.

9. 10 U.S.C. 973 provides in pertinent part:

Duties: officers on active duty; performance of civil functions restricted

* * * * *

(b)(1) This subsection applies—

(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days; and

(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days.

(2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

(i) that is an elective office;

(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described

in subparagraph (A) when assigned or detailed to that office or to perform those functions.

(3) Except as otherwise authorized by law, an officer to whom this subsection applies by reason of subparagraph (A) of paragraph (1) may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State).

* * * * *

(5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

* * * * *

(d) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.

10. 28 U.S.C. 1259 provides:

Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

11. 10 U.S.C. 973 (1982) provided in pertinent part:

Duties: officers on active duty; performance of civil functions restricted

(a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.

(b) Except as otherwise provided by law, no regular officer of an armed force on active duty may hold a civil office by election or appointment, whether under the United States, a Territory or possession, or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.

12. Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, Tit. X, Pt. A, § 1002, 97 Stat. 655-656 provides:

PERFORMANCE OF CIVIL FUNCTIONS BY MILITARY OFFICERS

SEC. 1002. (a) Section 973 of title 10, United States Code, is amended by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) This subsection applies—

"(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

"(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days; and

"(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days.

"(2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

"(i) that is an elective office;

"(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

"(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

"(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

"(3) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government).

"(4) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

"(c) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.".

(b) Nothing in section 973(b) of title 10, United States Code, as in effect before the date of the enactment of this Act, shall be construed—

(1) to invalidate any action undertaken by an officer of an Armed Force in furtherance of assigned official duties; or

(2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer in furtherance of assigned official duties.

(c) Nothing in section 973(b)(3) of title 10, United States Code, as added by subsection (a), shall preclude a Reserve officer to whom such section applies from holding or exercising the functions of an office described in such section for the term to which the Reserve officer was elected or appointed if, before the date of the enactment of this Act, the Reserve officer accepted appointment or election to that office in accordance with the laws and regulations in effect at the time of such appointment or election.

(d) The Act entitled "An Act to grant the consent of the United States to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas", approved December 22, 1980 (94 Stat. 3305), is amended by adding at the end thereof the following new section:

"SEC. 5. (a) The President may appoint a regular officer of the Army, Navy, Air Force, or Marine Corps who is serving on active duty as the Federal Commissioner of the Commission.

"(b) Notwithstanding the provisions of section 973(b) of title 10, United States Code, acceptance by a regular officer of the Army, Navy, Air Force, or Marine Corps of an appointment as the Federal Commissioner of the Commission, or the exercise of the functions of Federal Commissioner and chairman of the Commission, by such officer shall not terminate or otherwise affect such officer's appointment as a military officer.".

13. Act of July 15, 1870, ch. 294, § 18, 16 Stat. 819 provides:

SEC. 18. *And be it further enacted*, That it shall not be lawful for any officer of the army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.

APPENDIX B

Department of Defense

DIRECTIVE

NUMBER 1344.10
Feb. 19, 2008

USD(P&R)

SUBJECT: Political Activities by Members of the Armed Forces

References: (a) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces on Active Duty," August 2, 2004 (hereby canceled)

(b) Sections 973, 888, 101, and Chapter 47 of title 10, United States Code

(c) DoD Instruction 1334.1, "Wearing of the Uniform," October 26, 2005

(d) Section 441a of title 2, United States Code

(e) through (i), see Enclosure 1

1. PURPOSE

This Directive:

1.1. Reissues Reference (a) to update policies on political activities of members of the Armed Forces.

1.2. Implements section 973(b) through (d) of Reference (b).

* * * * *

3. DEFINITIONS

The terms used in this Directive are defined in Enclosure 2.

4. POLICY

* * * * *

4.4. Holding and Exercising the Functions of a U.S. Government Civil Office Attained by Election or Appointment

4.4.1. Paragraph 4.4. applies to a civil office in the U.S. Government that:

4.4.1.1. Is an elective office;

4.4.1.2. Requires an appointment by the President; or

4.4.1.3. Is in a position on the executive schedule under sections 5312-5317 of Reference (i).

4.4.2. A regular member, or retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days, may not hold or exercise the functions of civil office set out in subparagraph 4.4.1. unless otherwise authorized in paragraph 4.4. or by law.

4.4.3. A retired regular member, or a Reserve Component member on active duty under a call or order to active duty for 270 days or fewer, may hold and

exercise the functions of a civil office provided there is no interference with the performance of military duty.

4.4.4. A member on active duty may hold and exercise the functions of a civil office under paragraph 4.4. when assigned or detailed (while on active duty) to such office to perform such functions, provided the assignment or detail does not interfere with military duties.

4.4.5. Any member on active duty authorized to hold or exercise or not prohibited from holding or exercising the functions of office under paragraph 4.4. are still subject to the prohibitions of subparagraph 4.1.2.

* * * * *

4.6. Actions When Prohibitions Apply

4.6.1. Members affected by the prohibitions against being a nominee or candidate or holding or exercising the functions of a civil office may request retirement (if eligible), discharge, or release from active duty. The Secretary concerned may approve these requests, consistent with the needs of the Service, unless the member is:

4.6.1.1. Obligated to fulfill an active duty service commitment.

4.6.1.2. Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile pay fire area.

4.6.1.3. Ordered to remain on active duty while the subject of an investigation or inquiry.

4.6.1.4. Accused of an offense under Chapter 47 of Reference (b) or serving a sentence or punishment for such an offense.

4.6.1.5. Pending other administrative separation action or proceedings.

4.6.1.6. Indebted to the United States.

4.6.1.7. In a Reserve Component and serving involuntarily under a call or order to active duty that specifies a period of active duty of more that 270 days during a period of declared war or national emergency; or other period when a unit or individual of the National Guard or other Reserve Component has been involuntarily called or ordered to active duty as authorized by law.

4.6.1.8. In violation of this Directive or an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

4.6.2. Subparagraph 4.6.1. does not preclude a member's involuntary discharge or release from active duty.

4.6.3. No actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member having been a candidate or nominee for a civil office in violation of the prohibition of paragraph 4.2. or having held or exercised the functions of a civil office in violation of the prohibitions of paragraphs 4.4. or 4.5.

4.6.4. This is a lawful general regulation. Violations of paragraphs 4.1. through 4.5. of this Directive by persons subject to the Uniform Code of Military

Justice are punishable under Article 92, "Failure to Obey Order or Regulation," Chapter 47 of Reference (b).

* * * * *

E2. ENCLOSURE 2

DEFINITIONS

* * * * *

E2.3. Civil Office. A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.

* * * * *

Nos. 16-961, 16-1017, and 16-1423

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI, *Petitioner*,

v.

UNITED STATES, *Respondent*.

LAITH G. COX, *ET AL.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

KEANU D.W. ORTIZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR THE PETITIONERS

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January 5, 2018

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* *

REPLY BRIEF FOR THE PETITIONERS

For 148 years, the dual-officeholding ban codified at 10 U.S.C. § 973(b)(2)(A) has separated the civilian and military spheres of government by barring active-duty military officers from simultaneously holding civilian positions without explicit congressional approval. To ensure that the ban fulfills its purpose:

1. It has always been read to apply to a capaciously defined class of "civil offices," including numerous offices the functions of which have historically been performed by military officers. Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 18–24 (1983) ["Olson Memo"], https://perma.cc/YLM8-KTR6; *see Acting Secretary of War*, 14 Op. Att'y Gen. 200, 201 (1873).

2. The exception for cases of dual officeholding "as otherwise authorized by law" has been narrowly interpreted to require unambiguous congressional authorization. *Memorandum for the General Counsel*, 3 Op. O.L.C. 148, 150 (1979) ["Harmon Memo"].

3. Absent circumstances not presented here, a violation of the ban results in the officer's immediate forfeiture of his first (military) office. *Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 Op. O.L.C. 1, 3 (2016) ["Thompson Memo"].

Applying these settled understandings, this should be an easy case: Judges appointed by the President to the Court of Military Commission Review (CMCR) with the advice and consent of the Senate hold a "civil office" that Congress has not specifically authorized military officers to hold. Thus, when Judges Burton,

Celtnieks, Herring, and Mitchell were appointed to the CMCR, they forfeited their commissions as military officers—disqualifying them from continuing to sit on the Courts of Criminal Appeals (CCAs).

In its brief, the government abandons these understandings. It contends that the four judges' dual officeholding was lawful because CMCR judges do not hold a "civil office," and because Congress in any event authorized such dual officeholding in the Military Commissions Act of 2009 (MCA). But even if the dual officeholding violated § 973(b)(2)(A), the government claims that, when Congress narrowed the ban in 1983, it also eliminated any consequence for its violation.

These interpretations would not only eviscerate a statute that "embodies an important policy designed to maintain civilian control of the Government," Harmon Memo at 150; they would also raise novel and serious constitutional questions. Because the relevant authorities do not compel such counterintuitive results, this Court should reject them.

I. The Four Judges' Dual Officeholding Violated § 973(b)(2)(A)

The CMCR was originally established under the Military Commissions Act of 2006, which directed the Secretary of Defense ("the Secretary") to create it within the Department of Defense (DoD). 10 U.S.C. § 950f(a) (2006). In the 2009 MCA, though, Congress reconstituted the CMCR as an Article I "court of record." *Id.* § 950f(a). Thus, regardless of whether the CMCR was *initially* "a military court modeled on the CCAs," U.S. Br. 13, the 2009 MCA intentionally scrapped that model—one of several reforms to increase the CMCR's independence vis-à-vis the Executive Branch. Pet. Br. 9–10.

The 2009 MCA also changed how CMCR judges are selected. The 2006 Act had authorized the Secretary to "assign appellate military judges" to the CMCR, who could be military officers or civilians. 10 U.S.C. § 950f(b) (2006). To avoid Appointments Clause concerns, *see Weiss* v. *United States*, 510 U.S. 163, 170 n.4 (1994), the 2009 MCA took away the Secretary's power to "assign" civilians to the CMCR, and instead authorized the President to "appoint . . . additional judges" with the advice and consent of the Senate. 10 U.S.C. § 950f(b)(3).

The government contends that the four judges' appointments did not violate § 973(b)(2)(A) because CMCR judges do not hold a "civil office," and, even if they did, military officers appointed to the CMCR hold such an office "as . . . authorized by law," *i.e.*, the MCA. Because of the changes Congress adopted in 2009, these arguments both fail.

A. "Civil office." Judges appointed to the CMCR under § 950f(b)(3) hold a "civil office" because Congress created that position by statute; because its holders exercise the sovereign authority of the United States; and because civilians may (and, indeed, do) hold it. Pet. Br. 30–34. The government does not dispute that these criteria are satisfied; it argues that such judges don't hold a "civil office" because they exercise a "military function"—reviewing military commission trials of enemy belligerents. And the sole justification offered for this characterization is the claim that military officers have previously exercised an analogous function. U.S. Br. 20–22.

This argument founders on its premise. The government's examples, *id.* at 26 n.6, are all of officers exercising administrative oversight—akin to the role

played by the Convening Authority under the MCA, 10 U.S.C. § 950b, not the CMCR. As the government concedes, "formal appellate oversight [of military commissions] is new." U.S. Br. 26; *see* Pet. Br. 9 n.10 (noting the lack of appellate review until 2005).[1]

Nor does it follow that, because military officers have in the past performed a particular function, that function is by definition "military"—let alone that an office in which it is performed must not be "civil." Military officers perform countless civil functions, just as civilian judges holding indisputably civil offices have play a central role in military justice—including on the Court of Appeals for the Armed Forces (CAAF).

But even if CMCR judges do perform functions that are in some sense "military" in nature, that would hardly prove that they do not hold "civil offices." Until this litigation, the government properly construed the term "civil office" in § 973(b) to cover even some offices that predominantly exercise military functions, such as Secretary of War. *Acting Secretary of War*, 14 Op. Att'y Gen. at 201; *see* Olson Memo at 18–24. Military offices, in contrast, are defined by "rank, title, pay, and retirement." Pet. Br. 32 n.22.

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1. In addition, judges who review military commissions "are primarily called upon to address questions about the laws of war, a body of international law hardly foreign to federal courts, and questions about the constitutional constraints on military commissions, an area in which Article III courts, *not* military courts, are especially expert." *In re Al-Nashiri*, 835 F.3d 110, 139 (D.C. Cir. 2016) (Tatel, J., dissenting) (citations omitted).

To that end, the D.C. Circuit has regularly reversed CMCR decisions on questions of military law—even for plain error. *E.g.*, *Al Bahlul* v. *United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014) (en banc).

Congress has endorsed this reading, expressly authorizing military officers to hold numerous civil offices that primarily exercise core military functions. Pet. Br. 31; Olson Memo at 16. The critical difference between these offices and second "military" offices (such as the Chairman of the Joint Chiefs of Staff) is not their function, but the fact that civilians can hold them. Thus, even if CMCR judges appointed under § 950f(b)(3) exercise a "military function," that would not settle whether they hold a "civil office" under § 973(b)(2)(A); one could similarly describe judges on CAAF or the Court of Appeals for Veterans Claims.

In contrast, Petitioners' definition of "civil office" is consistent with the history and purpose of the dual-officeholding ban and the government's own prior understanding. If the office is created by statute, if its holder exercises the sovereign authority of the United States, and—most importantly—if it can be held by civilians, it is a "civil office" under § 973(b)(2)(A).[2] Judges appointed to the CMCR under § 950f(b)(3) easily meet this test.

B. "Except as Otherwise Authorized by Law." Under § 973(b)(2)(A), a military officer may not hold, or exercise the functions of, a civil office "[e]xcept as otherwise authorized by law." As OLC has explained, "[w]here Congress wishes to permit a military officer to occupy a civilian position . . . without forfeiting his commission, it has [said] so explicitly." Harmon Memo at 150. But the MCA says nothing at all—let alone

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2. The government argues that our definition of "civil office" encompasses the CCAs. U.S. Br. 25. This misses the significance of the 2009 MCA. CCAs are established by service-branch Judge Advocates General, not Congress, 10 U.S.C. § 866(a), and thus more closely resemble the original CMCR than the present one.

anything explicit—about whether military officers may hold the office of CMCR judge "*as* otherwise authorized by law," *i.e.*, by presidential appointment. Pet. Br. 39–42.

The government does not argue that § 950f(b)(3) provides the requisite clear statement. Instead, it pitches its argument on a different MCA provision—§ 950f(b)(2), which authorizes the Secretary to "assign" military officers to the CMCR. U.S. Br. 27–30. Of course, § 950f(b)(2)'s express reference to military officers only underscores Congress's silence as to whether those officers may serve on the CMCR "as" authorized by § 950f(b)(3). Pet. Br. 40–41.

The government nevertheless insists that the MCA satisfies § 973(b)(2)(A) because "both assigned and appointed [CMCR] judges hold the same office." U.S. Br. 28. But even if "assigned" CMCR judges hold the same "office" as "appointed" CMCR judges (and as we show below, they don't), that would not satisfy § 973(b)(2)(A). The question is not, as the government suggests, whether the military officer is otherwise authorized "to hold the office," but rather whether he or she holds that office "*as* otherwise authorized by law," *i.e.*, in the manner Congress authorized. And a military officer holding the office of CMCR judge by appointment under § 950f(b)(3), as opposed to by assignment under § 950f(b)(2), is plainly *not* holding the office "as" authorized by the MCA.

In any event, military officers who have been "assigned" to the CMCR do not hold the "same office" as those "appointed" to the court—not because Congress created two separate "offices" of CMCR judges, but because an officer "assigned" to exercise the duties of another position holds only one office for

Appointments Clause purposes, not two. *Weiss*, 510 U.S. at 172–76; *see id.* at 191 (Souter, J., concurring) (military judges hold "a single military office").

It is well settled that "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed," *Shoemaker* v. *United States*, 147 U.S. 282, 300–01 (1893), so long as the new duties are "germane" to the offices "already held." *Id.* at 300. Otherwise, as Justice Scalia explained in *Weiss*, "taking on the nongermane duties of military judge would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." 510 U.S. at 196 (Scalia, J., concurring in part and concurring in the judgment) (alteration in original).

Thus, when Congress in 2006 provided that the Secretary could "assign" military officers to the CMCR, it did not create a new office for those officers to fill. It merely added "additional duties, germane to the offices already held by" military officers. *Shoemaker*, 147 U.S. at 301. But when Congress in 2009 provided that the President, by and with the advice and consent of the Senate, could "appoint" "additional judges" to the CMCR, it *did* create a new (civil) office. That's why judges who have been appointed to the CMCR receive commissions *as* CMCR judges, J.A. 180, 182, 184, 186, whereas judges who have been assigned to the CMCR do not.

The difference between these methods is not "merely stylistic." *Edmond* v. *United States*, 520 U.S. 651, 657 (1997). As we have explained, Pet. Br. 41, different rules govern how the two types of CMCR

judges are chosen (and by whom); what qualifications (if any) are required of them; how they are paid; and how they may be removed.

The government is therefore correct that "Section 950f establishes only one office," U.S. Br. 27, but it is wrong as to which office Congress established; the office created by the MCA is that of a judge appointed by the President under § 950f(b)(3)—which military officers do not hold "as otherwise authorized by law."[3]

II. The Four Judges' Dual Officeholding Terminated Their Military Service

Had the violation of the dual-officeholding ban occurred before 1983, there would be no dispute that the four judges would have forfeited their military commissions by operation of law. 10 U.S.C. § 973(b) (1982). The government argues, however, that when Congress amended § 973(b) in 1983, it eliminated *any* consequence for violating the ban—to either the officer or the actions they undertook while unlawfully holding two offices. In reaching this conclusion, the government ignores the structure, context, and purpose of the 1983 amendments—and argues against its own prior constructions of that statute.

It is common ground that the 1983 Act was a direct response to the Olson Memo, and its conclusion that the assignment of JAG lawyers to exercise the functions of Special Assistant U.S. Attorneys violated

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3. In opposing certiorari, the government had also argued that judges appointed to the CMCR under § 950f(b)(3) do not hold an office that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii); *see Dalmazzi* Opp. Br. 17–18; *Ortiz* Opp. Br. 12–13. It no longer appears to dispute that § 950f(b)(3) itself requires such an appointment. U.S. Br. 30 n.8.

§ 973(b). The Olson Memo also implied that Congress should *allow* such assignments going forward, because the ban was meant to focus on unauthorized civil offices held by election or appointment. Olson Memo at 15 n.20. After all, under *Shoemaker*, an officer who has merely been assigned to exercise the functions of a civilian position (like the JAG lawyers) is not in fact "holding" two offices at once.

In response, Congress narrowed the offices covered by the ban to those that satisfy the additional criteria set out in § 973(b)(2)(A), which generally require election or presidential appointment and Senate confirmation. And in line with *Shoemaker*, Congress authorized military officers to exercise the functions of all other "civil offices" if they were "assigned or detailed" thereto. 10 U.S.C. § 973(b)(2)(B).

Because Congress narrowed the scope of the ban (in section 1002(a) of the 1983 Act), it also sought, at OLC's urging, to eliminate any consequence for actions officers had undertaken in "assigned" (but *not* elected or appointed) civil roles before 1983. To that end, the next subsection (section 1002(b)) provided:

> Nothing in [§ 973(b)] as in effect before the date of enactment . . . shall be construed—(1) to invalidate any action undertaken by an officer of an Armed Force *in furtherance of assigned official duties*; or (2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer *in furtherance of assigned official duties*.

DoD Authorization Act, 1984, Pub. L. No. 98-94, § 1002(b), 97 Stat. 614, 655 (1983) (codified at 10 U.S.C. § 973 note) (emphases added).

As the emphasized text makes clear, Congress's focus was exclusively on previously unauthorized *assignments*. To that end, section 1002(b) immunized officers from termination if they had been unlawfully assigned to a civil office (*e.g.*, JAG lawyers), and insulated from collateral attack those actions the officers undertook "in furtherance of [such] assigned official duties" (*e.g.*, civilian convictions obtained by JAG lawyers)—and nothing more. If a military officer had been elected or appointed to an unauthorized civil office before 1983, section 1002(b) had no effect.

Whereas section 1002(b) applied only to pre-1983 violations of the ban, Congress also provided two prospective remedial reforms. *First*, it enacted, as § 973(b)(5), a verbatim copy of section 1002(b)(1)'s immunity provision: "Nothing in this subsection shall be construed to invalidate any action undertaken by an officer *in furtherance of assigned official duties*."

Second, apparently in response to abuse of § 973(b) by Vietnam-era officers (some of whom accepted minor local offices to terminate their military service), U.S. Br. 32 n.9, Congress deleted language automatically vacating the military commission of any officer "accepting or exercising the functions of a civil office." 10 U.S.C. § 973(b) (1982). And it delegated to the Secretary the power to "prescribe regulations to implement [§ 973]," currently reflected in *Political Activities by Members of the Armed Forces*, DoD Directive 1344.10 (2008) ["Directive 1344.10"].

The Directive identifies eight circumstances in which an officer does not have to be terminated for violating § 973(b)(2)(A). *Id.* ¶¶ 4.6.1.1–4.6.1.9.[4] In

4. Perhaps because of the Vietnam-era issue, the first two exceptions are for officers "[o]bligated to fulfill an active duty

such cases, however, the Directive does not *permit* the officer to simultaneously hold both offices, *id.* ¶ 4.4.2 (prohibiting dual officeholding on the same terms as § 973(b)(2)(A)); instead, it presumably precludes the officer's acceptance of the *civil* office.

Notwithstanding this backdrop, the government's principal argument is that these reforms (1) generally exempt military officers from termination of their military office for violations of even the post-1983 dual-officeholding ban; and (2) preclude collateral attacks on all actions dual officeholders take in either position after assuming an unauthorized civil office. The necessary implication of this argument is that Congress in 1983 neutered the dual-officeholding ban. But as the government's own understanding (until this litigation) underscores, nothing in the 1983 Act supports—let alone compels—such a jarring result.

A. Mandatory Termination. The government now insists that when Congress deleted the statutory termination requirement in 1983, it also abrogated the common law rule that unlawful dual officeholding triggers disqualification from the first office—and instead left to the Secretary's sole discretion whether a military officer should forfeit his military office upon violating § 973(b)(2)(A). U.S. Br. 34–37.

As the government concedes, no legislative history supports this claim. *Id.* at 36. And the government's own Directive contradicts it, identifying eight specific circumstances in which termination is not required. There would have been no reason for the Secretary to delineate those exceptions if the common law rule no

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service commitment" or "[s]erving . . . in an area that is overseas, remote, a combat zone, or a hostile pay fire area." Directive 1344.10 §§ 4.6.1.1–4.6.1.2.

longer applied. Instead, the better reading is that Congress gave the Secretary discretion to depart from that rule in appropriate cases—to insist upon forfeiture of the civil, rather than military, office—but that it otherwise remains in force. Pet. Br. 42–43.

This reading is reinforced by the 2016 Thompson Memo, in which both OLC and DoD continued to read § 973(b)(2)(A) (and not just the Directive) to "prohibit continuation of military status upon appointment to a covered position." Thompson Memo at 3;[5] *see also Reserve Officer Holding Civil Office*, 4 Civ. L. Op. JAG A.F. 391, 391 (1991) ("[A] member elected or appointed to a prohibited civil office may request retirement and shall be retired if eligible. If such member does not request or is not eligible for retirement, the member shall be discharged or released from active duty."); Dep't of Def., Standards of Conduct Off., Advisory No. 02-21, *What Constitutes Holding a "Civil Office" by Military Personnel* (2002) ("The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office.").

The government's only rejoinder is language in the Directive providing that an officer "may request retirement (if eligible), discharge, or release from active duty." Directive § 1344.10 ¶ 4.6.1. In its view, this language establishes that "[t]ermination . . . is not automatic upon the acceptance of the prohibited office; it is expressly made discretionary." U.S. Br. 37.

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5. The government claims that the Thompson Memo was addressed to "the substantive reach of Section 973(b), not the remedy for a violation." U.S. Br. 37 n.10. But the quoted language reflected DoD's assumption (that OLC did not dispute) that *if* DoD was correct about "the substantive reach of Section 973(b)," *then* the ban would "prohibit continuation of military status."

But the Directive's permissive language is with respect to *how* offending officers are to be terminated from the military (voluntarily or involuntarily), not *whether* they must be terminated. Directive 1344.10 ¶ 4.6.2 ("Subparagraph 4.6.1. does not preclude a member's involuntary discharge or release from active duty."). Thus, the Directive does not override the dual-officeholding ban itself; it merely overrides the common law incompatibility rule in cases in which the penalty inures to the civil—not military—office.

Because none of those circumstances are present here, the common law rule applies. Pet. Br. 42–45. When the four judges began to exercise the functions of judges appointed to the CMCR under § 950f(b)(3), they forfeited their military commissions and thereby became ineligible to participate in Petitioners' CCA appeals—rendering those decisions not just voidable, but void. *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995); *see Nguyen* v. *United States*, 539 U.S. 69, 77 (2003) (declining to apply the *de facto* officer doctrine to "irregularities in the assignment of judges").

B. § 973(b)(5). The government falls back on § 973(b)(5): "Nothing in [§ 973(b)] shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." In its view, this text immunizes all actions an unlawful dual officeholder takes going forward in *both* offices.

The government claims that Petitioners "do not appear to dispute that a natural reading of Section 973(b)(5) forecloses [our] claim." U.S. Br. 33. On the contrary, our opening brief demonstrated how the limiting phrase "in furtherance of assigned official duties" in § 973(b)(5), when read alongside the same language in section 1002(b) of the 1983 Act, clearly

refers only to those duties the officer undertook in a position to which he or she was unlawfully *assigned*. Pet. Br. 46–47. Indeed, the fact that § 973(b)(5) is a word-for-word copy of section 1002(b)(1) of the 1983 Act only reinforces that it has this meaning. *Id.* at 48.

Tellingly, the government has no explanation for how the same language in adjacent provisions of the same statute could have the radically different meanings its brief implies. Instead, it asserts that our reading renders § 973(b)(5) superfluous, because section 1002(b)(1) of the 1983 Act retroactively insulated officers' actions in civil offices to which they had unlawfully been assigned (and such assignments are no longer possible after the 1983 Act). U.S. Br. 34.

In fact, there is no such superfluidity: military officers *can* still be unlawfully assigned to civil offices today—offices listed "in the Executive Schedule under [5 U.S.C. §§ 5312–17]." 10 U.S.C. § 973(b)(2)(A)(iii).[6] Properly understood, § 973(b)(5) is the prospective counterpart to the immunity retroactively conferred by section 1002(b)(1). Nothing in the text, context, or purpose of the 1983 amendments supports the conclusion that Congress intended anything more. Section 973(b)(5) therefore has no bearing in cases—like these—in which the dual officeholding results from unauthorized appointments.

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6. Like the government, our opening brief neglected this provision in suggesting that "a prohibited civil office requires an election or an appointment." Pet. Br. 47. Although many offices listed in the Executive Schedule also require an appointment by the President with the advice and consent of the Senate, roughly one-third of them do not. *E.g.*, 38 U.S.C. § 308(a)(3) (four of seven Assistant Secretaries of Veterans Affairs may be appointed "without the advice and consent of the Senate").

III. The Government's Position Raises Serious Constitutional Questions

If the government is correct that no consequence stems from the four judges' dual-officeholding violation, or that there was no violation in the first place, that conclusion would raise two novel and substantial constitutional questions.

A. The Commander-in-Chief Clause. The Constitution "vest[s] in the President the supreme command over all the military forces." *United States* v. *Sweeny*, 157 U.S. 281, 284 (1895). That includes his "right to decide according to [his] own judgment what officer shall perform any particular duty." *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 468 (1860).

As the government has argued elsewhere, judges appointed under § 950f(b)(3) do not serve at the pleasure of the President; they can be removed only for "good cause." *In re Khadr*, 823 F.3d 92, 98 (D.C. Cir. 2016); *see Wiener* v. *United States*, 357 U.S. 349, 356 (1958). Thus, if the four judges did not forfeit their military commissions when they began to exercise the functions of appointed CMCR judges, they would have been insulated from the President's command and control—thereby raising a serious Commander-in-Chief Clause question.[7]

Instead of defending the constitutionality of "good cause" removal for military officers appointed to the CMCR under § 950f(b)(3), the government claims that

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7. Although a CMCR appointment would not prevent the President from terminating an officer's military commission, the CMCR's "good cause" removal restriction could certainly hamper the President's ability to reassign that officer to conflicting military duties that the President determines to be more pressing or appropriate.

these presidential appointees can nevertheless be "reassigned" from the CMCR by the Secretary under 10 U.S.C. § 949b(b)(4). U.S. Br. 41. This square-peg-into-a-round-hole reasoning is not only unfounded; it would not actually solve the constitutional problem.

The government offers no evidence that Congress intended to give the Secretary (to say nothing of the DoD General Counsel)[8] the power, by "reassignment," to remove a CMCR judge appointed by the President with the advice and consent of the Senate. "Under the traditional default rule, removal is incident to the power of appointment." *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 509 (2010); *see Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839). Even if Congress *could* constitutionally depart from that rule, there is no evidence that it did so in the MCA.[9]

In any event, § 949b(b)(4) still constrains the President's power to direct the actions of military officers by limiting the reassignment of CMCR judges to four specific circumstances.[10] Thus, whether their

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8. The Secretary has delegated his reassignment authority to the DoD General Counsel. Regulation for Trial by Military Commission ¶ 25-2(g).

9. The government's only support for its newfangled construction of § 949b(b)(4) comes from the text of the judges' nominations and commissions—in which Congress played no part. U.S. Br. 30. It is Congress, though, that defines the removal conditions of an office it creates. And even if those terms *could* be altered by presidential fiat, the nominations and commissions here refer only to the "unlawful influence prohibitions . . . under [§ 949b(b)]," 162 Cong. Rec. S1474 (daily ed., Mar. 14, 2016).

10. In telling contrast to the reassignment of CMCR judges under § 949b(b)(4), Congress has left the rules for reassigning CCA judges entirely to the President. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5330(a), 130 Stat. 2000, 2932 (2016) ("In accordance with

removal is governed by "good cause" or by § 949b(b)(4), it would raise a novel and serious question under the Commander-in-Chief Clause if military officers were simultaneously allowed to hold office as judges appointed to the CMCR under § 950f(b)(3).

2. The Appointments Clause. The government has not identified a single instance in which the same individual has simultaneously held different offices through which they served on different federal courts—or has simultaneously held office as both an inferior and a principal officer within the Executive Branch. Instead, as proof that such dual officeholding poses no unconstitutional "incongruity," it points to judges who serve on the Foreign Intelligence Surveillance Court and Court of Review, and those who sit by designation on other courts. U.S. Br. 39.

Here, again, Congress has not created a second, inferior "office" that the judges hold simultaneously with their principal Article III office; such judges are all "designated" temporarily to serve on those second tribunals in their capacity as holders of their underlying judgeships. 28 U.S.C. §§ 291–97; 50 U.S.C. § 1803(a)(1), (b). As for the incongruity of a principal officer (on the CMCR) serving alongside inferior officers (on the CCAs), the government's purported counterexamples are likewise inapposite. Justices, circuit judges, and district judges may hold offices on different courts, but they are all *principal* officers. *Freytag* v. *C.I.R.*, 501 U.S. 868, 884 (1991); *see Weiss*, 510 U.S. at 191–92 & n.7 (Souter, J., concurring).

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regulations prescribed by the President, assignments of [judges to the CCAs] shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.").

The government says we have "all but abandon[ed] the Appointments Clause as a freestanding claim." U.S. Br. 37. Far from it. Pet. Br. 52 ("[S]uch simultaneous service is unconstitutional."); *see Free Enterprise Fund*, 561 U.S. at 505 ("Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." (citation and internal quotation marks omitted)). But the Court can and should avoid resolving that question—by construing any ambiguity in § 973(b) to prohibit a military officer from also serving as a presidentially appointed judge on the CMCR.

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"In general, courts should think hard, and then think hard again, before turning small cases into large ones." *Camreta* v. *Greene*, 563 U.S. 692, 707 (2011). We obviously do not believe that this is a small case, but the government would make it far bigger than it needs to be—asking this Court not only to hold that Congress eviscerated the dual-officeholding ban in 1983, but to resolve the novel constitutional questions such a holding would provoke. There are good reasons to assume that Congress "does not . . . hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Even better reasons militate against the unnecessary resolution of difficult constitutional questions.

IV. This Court Can—and Should—Reverse All Eight Judgments Below

Finally, if this Court reverses CAAF's judgment in *Ortiz*, it should do so in *Dalmazzi* and the six cases consolidated in *Cox*, as well.

A. Jurisdiction. In arguing against this Court's jurisdiction in *Dalmazzi* and *Cox*, the government

pays scant attention to the text of 28 U.S.C. § 1259(3), which conditions this Court's review solely on whether CAAF (1) granted a petition for review; and (2) issued a decision. Pet. Br. 23–27. CAAF did both of those things in all eight cases before the Court.

The government's argument rises and falls on 10 U.S.C. § 867a(a), which provides that "[t]he Supreme Court may not review by a writ of certiorari under this section any action of [CAAF] in refusing to grant a petition for review." U.S. Br. 42–43. But CAAF did far more than "refus[e] to grant a petition for review" in *Dalmazzi*: it granted the petition, specified additional issues, received full merits briefing, heard oral argument, and issued a published, precedential opinion (resolving one of the issues on which review was granted), before *purporting* to vacate the grant of review and deny the petition at the end of its ruling.

Nor is the attempt to analogize these cases to those in which a district court withdraws a prior grant of certification under 28 U.S.C. § 1292(b) convincing. That provision conditions jurisdiction not on whether a specific procedural step *happened*, but on the judge's "opinion." Opinions can change; facts cannot. The government is correct that CAAF "hold[s] the key allowing access to the Supreme Court," U.S. Br. 43. But once that key has been turned, § 1259(3) precludes *un*-turning it and thereby evading review.

Otherwise, CAAF could conclude its precedential opinions with the disposition it tacked onto *Dalmazzi*,[11] and thereby render this Court (and a

11. CAAF has even relied upon its substantive analysis in *Dalmazzi* in subsequent opinions. *E.g.*, *United States* v. *Richards*, 76 M.J. 365, 367 n.1 (C.A.A.F. 2017) (noting "our

habeas court, Pet. Br. 27 n.18) powerless to review them. That is not what Congress intended when it enacted § 1259(3), and it is not compelled by the text of either that provision or § 867a(a). This Court therefore has jurisdiction in all eight cases.[12]

B. "Abuse of Discretion." The government also suggests that, because CAAF had discretion to deny the petitions for review in *Dalmazzi* and the six cases consolidated in *Cox*, its decisions should only be reviewed for an "abuse of discretion." U.S. Br. 52–53. The government waived this argument by failing to raise it in opposing certiorari. S. Ct. R. 15.2; *see Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

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holding in . . . *Dalmazzi*"); *United States* v. *Commisso*, 76 M.J. 315, 318 n.2 (C.A.A.F. 2017) (citing *Dalmazzi*).

12. Petitioners agree with the government that this Court can constitutionally hear appeals from CAAF. U.S. Br. 45–51; *see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("[T]he essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted . . . .").

As the government correctly argues, this Court's appellate jurisdiction does not turn—and never has turned—on whether the "proceedings in a cause already instituted" took place before an Article III court. *E.g.*, *United States* v. *Coe*, 155 U.S. 76, 85 (1894) (upholding direct review from an Article I tribunal); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337–39 (1816) (upholding direct review from state courts). The touchstone is whether the underlying proceeding was "judicial." *E.g.*, *Tutun* v. *United States*, 270 U.S. 568, 576 (1926). The *amicus* could hardly claim that CAAF's proceedings are not "judicial," in contrast to Secretary of State Madison's refusal to deliver William Marbury's commission. CAAF's administrative location and Article I status are therefore immaterial to whether this Court may constitutionally exercise appellate jurisdiction over it.

Waiver aside, this contention also lacks merit. The Petitioners in *Dalmazzi* and *Cox* are not challenging *whether* CAAF should have exercised its discretion to grant review, but rather its substantive analysis in support of the judgments. As with this Court's review of a state court with discretionary jurisdiction, how CAAF answers a federal question is subject to *de novo* review, even if CAAF could have declined to answer the question in the first place. *E.g.*, *Grady* v. *North Carolina*, 135 S. Ct. 1368, 1370 & n.* (2015).

Implicitly conceding that CAAF resolved *Dalmazzi* on the merits, the government closes by defending CAAF's analysis—asserting that the four judges were continuing to act in their capacity as *assigned* CMCR judges when they decided the *Dalmazzi* and *Cox* Petitioners' CCA appeals. U.S. Br. 53 n.17. This argument is substantively unavailing, Pet. Br. 27–29; it is also belied by the government's own conduct.

After *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015), the government obtained a stay from the CMCR while it sought to resolve the Appointments Clause problem identified therein. J.A. 171. On April 29, 2016 (the day after the Senate confirmed the four judges), the government asked the CMCR to lift the stay, *id.* at 172, conveying its (correct) understanding that the confirmations settled that constitutional problem—because they transformed the judges from "assigned" to "appointed" CMCR judges.

Even on the government's view, then, by the time the four judges took the oath of office as § 950f(b)(3) appointees on May 2, 2016 (if not sooner), they were "exercising the functions" of a "civil office."[13] All eight

13. Even if CAAF was correct that no impermissible dual officeholding occurred until President Obama signed Judge

Petitioners are therefore entitled to have the appeals of their court-martial convictions re-heard by lawfully constituted CCA panels.

Mitchell's commission on May 25, the Petitioner in *Dalmazzi* and one of the *Cox* Petitioners are still entitled to relief. In *Dalmazzi*, the Petitioner sought rehearing before her Air Force CCA panel including Judge Mitchell on May 27. J.A. 6. In *Cox*, Petitioner Lewis moved for reconsideration before an Air Force CCA panel including Judge Mitchell on May 28. *Id.* at 45.

CONCLUSION

For the foregoing reasons and those previously stated, the decisions below should be reversed.

Respectfully submitted,

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January 5, 2018

RECORD AND BRIEFS

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No. 16-961

IN THE
Supreme Court of the United States

NICOLE A. DALMAZZI,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

SUPPLEMENTAL BRIEF OF THE PETITIONER

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioner files this brief to apprise the Court of two relevant developments subsequent to the filing of the Petition.

1. On February 9, 2017 (two days after argument), the U.S. Court of Appeals for the Armed Forces (CAAF) issued a summary "order and judgment" in *United States* v. *Ortiz*, No. 16-671 (C.A.A.F. Feb. 9, 2017) (mem.), a case in which CAAF had granted review on issues materially similar to the second and third questions presented here. *See United States* v. *Ortiz*, 75 M.J. 473 (C.A.A.F. 2016) (granting review).[1] The *Ortiz* order provided only that "the decision of the Air Force Court of Criminal Appeals is hereby affirmed," and that "[t]he opinion of the Court will be issued on a future date." *Ortiz*, No. 16-671, at 1.

2. Four days later, on February 13, 2017, CAAF appeared to confirm that, whatever it had decided in *Ortiz*, that decision necessarily settled the merits of the second and third questions presented in this case. Thus, in *United States* v. *Buford*, No. 16-689 (C.A.A.F. Feb. 13, 2017) (mem.),[2] a case in which CAAF had also granted review on the same merits questions as those presented here, the Court of Appeals held that "the

---

1. The issues on which CAAF granted review were "whether United States Court of Military Commission Review [(CMCR)] Judge, Martin T. Mitchell, is statutorily authorized to sit as one of the Air Force Court of Criminal Appeals [(CCA)] judges on the panel that decided appellant's case," and "whether Judge Martin T. Mitchell's service on both the Air Force [CCA] and the [CMCR] violates the Appointments Clause given his status as a [principal] officer on the [CMCR]." *Ortiz*, 75 M.J. at 472.

2. Copies of CAAF's orders in *Ortiz* and *Buford* have been appended to this brief.

granted assigned issues are without merit in view of our holding in *United States v. Ortiz* . . . ." *Id.* at 1.

Between them, *Buford* and *Ortiz* make clear that CAAF has not only now answered the second and third questions presented, but that it has done so in a manner adverse to Petitioner—holding that it violates neither 10 U.S.C. § 973(b)(2)(A)(ii) nor the Appointments Clause for active-duty military officers like Judge Mitchell to continue to serve on Courts of Criminal Appeals while also serving as "additional judges" of the U.S. Court of Military Commission Review (CMCR) under 10 U.S.C. § 950f(b)(3).

* * *

The Petition in this case urged the Court to grant plenary review on all three of the questions presented, even though, at the time it was filed, CAAF had not yet answered two of them. *See* Pet. 13–18. As the Petition argued, if § 973(b)(2)(A)(ii) were construed *not* to prohibit Judge Mitchell's appointment as an "additional judge" of the CMCR, that conclusion would raise constitutional questions of the first order—with implications for over 100 pending cases in the lower military courts (and more by the day). *See* Pet. 15–17.[3]

Although this Court's intervention was imperative even *before* CAAF reached the merits of the dual-officeholding questions presented in these cases, CAAF's apparent (if unorthodox) resolution of those merits has only bolstered the need for—and appropriateness of—plenary review here (and now).

---

3. This Court has now received a petition for a writ of certiorari in six additional cases raising the same questions as those presented here. *See* Petition for a Writ of Certiorari, *Cox* v. *United States*, No. 16-__ (U.S. filed Feb. 21, 2017).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 24, 2017

No. 16-961

IN THE

Supreme Court of the United States

NICOLE A. DALMAZZI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE SUPPLEMENTAL BRIEF

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United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Keanu D.W. Ortiz, Appellant	USCA Dkt. No. 16-0671/AF Crim.App. No. 38839 ORDER AND JUDGMENT

On consideration of the briefs of the parties, the briefs of *amici curiae*, and oral argument, it is, by the Court, this 9th day of February, 2017,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed. The opinion of the Court will be issued on a future date. C.A.A.F. R. 43(b). A petition for reconsideration may be filed no later than 10 days after the date of the issuance of said opinion.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Charles D. Buford, Appellant	USCA Dkt. No. 16-0689/AF Crim.App. No. 2016-04 ORDER

On further consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals on appeal by the United States under Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, and the granted specified issue, it is noted that the court below has neither affirmed nor reversed the ruling of the military judge and instead has vacated the ruling at the court-martial and remanded the case to the military judge. There is, at present, no extant ruling which excludes evidence, and if the ruling below is effectuated, the judgment of the Court of Criminal Appeals would resume, not terminate, the proceedings. Additionally, the granted assigned issues are without merit in view of our holding in *United States v. Ortiz*, __ M.J. __ (C.A.A.F. 2017). Accordingly, it is, by the Court, this 13th day of February, 2017,

ORDERED:

That the order granting the petition for grant of review is hereby vacated and the case is returned to

the Judge Advocate General of the Air Force for execution of the remand and further consideration ordered by the Court of Criminal Appeals in accordance with *United States v. Kosek*, 41 M.J. 60, 64-65 (C.M.A. 1994).

For the Court,
/s/ William A. DeCicco
Clerk of the Court

Nos. 16-961, 16-1017, and 16-1423

In the Supreme Court of the United States

NICOLE A. DALMAZZI, *Petitioner*,

v.

UNITED STATES, *Respondent*.

LAITH G. COX, *ET AL.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

KEANU D.W. ORTIZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF PROFESSOR ADITYA BAMZAI AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus will address the following question:

Whether this Court has Article III jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Armed Forces.

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INTEREST OF *AMICUS CURIAE*[*]

Aditya Bamzai is an associate professor at the University of Virginia School of Law. He teaches and writes about civil procedure, federal courts, and administrative law, and he has an interest in the sound development of these fields.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, of the Constitution provides in relevant part: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Pertinent statutory provisions are reprinted in an appendix to this brief.

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[*] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* or his counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court lacks Article III jurisdiction to review these cases. The "court" from which petitioners seek review is the Court of Appeals for the Armed Forces ("CAAF"), a body located for constitutional purposes within the Executive Branch that does not exercise the "judicial Power" of the United States or of any sovereign. *See Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in the judgment) (observing that "[s]uch tribunals, like any other administrative board, exercise the executive power, not the judicial power of the United States"). Chief Justice Marshall's opinion in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), makes it clear that this Court cannot exercise "appellate Jurisdiction" under Article III directly from an officer of the Executive Branch. *Id.* at 175. There is no basis in law or logic to distinguish between a single officer (James Madison in *Marbury*) and a body composed of multiple officers (the CAAF), even if the latter is called a "court" by statute. Accordingly, the Court's exercise of jurisdiction in these cases violates Article III. For this reason, and as explained further below, the Court should dismiss the writs for lack of Article III jurisdiction.

Article III of the Constitution limits the jurisdiction of the federal courts, *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), including the Supreme Court, *see Marbury*, 5 U.S. at 173-76. Section 2 of Article III authorizes this Court to exercise "original Jurisdiction" over an enumerated list of "cases" and "controversies" and "appellate Jurisdiction" "[i]n all [ ] other Cases." U.S. Const. art. III, § 2. Interpreting this language in *Marbury*, Chief

Justice Marshall held that the Court's "original jurisdiction" was limited exclusively to those categories specified in the Constitution's text, and that its "appellate jurisdiction" could not be exercised by issuing a writ directly to an executive branch officer — in that case, James Madison. 5 U.S. at 174-76. As *Marbury* put it, "the essential criterion of appellate jurisdiction" is to "revise[] and correct[] the proceedings in a cause already instituted," rather than to "create that cause." *Id.* at 175; *see Munaf* v. *Geren*, 553 U.S. 674, 688 n.3 (2008) (observing that there is "some authority" — namely, *Marbury* — "for the proposition that this Court has [limited] original subject-matter jurisdiction").

Marbury bars the Court from deciding these cases. The provision that petitioners invoke (*see* Pet. Br. 3-4) to establish certiorari jurisdiction, 28 U.S.C. § 1259, violates Article III of the Constitution and *Marbury*'s holding by authorizing this Court to review directly the CAAF's exercise of "executive Power," without the intervening exercise of "judicial Power" by another court.

First enacted in 1983, section 1259 authorizes the Court to take jurisdiction over cases from, and to issue writs directly to, the CAAF. As this Court has recognized, although the CAAF is called a "court" by statute, it is not an Article III court, but rather an "Executive Branch entity." *Edmond* v. *United States*, 520 U.S. 651, 664 & n.2 (1997) (noting that provisions of the Uniform Code of Military Justice "make clear that [the CAAF] is within the Executive Branch"). Its members lack the structural protections that the Constitution establishes for Article III judges, such as life tenure, undiminishable salary, and removability

solely by impeachment and conviction. *See* U.S. Const. art. III, § 1. For constitutional purposes, the members of the CAAF thus stand on equal footing with James Madison in *Marbury*. Madison was, and the CAAF judges are, officers within the Executive Branch, rather than courts wielding the "judicial Power," over which this Court may exercise direct supervision. For the same reason that this Court could not issue a writ of mandamus to James Madison in 1803, it lacks jurisdiction in these cases to issue writs of certiorari to the CAAF.

Indeed, as early as the Civil War, the Court recognized the implications of *Marbury*'s holding for its supervisory relationship over the military-court system. In *Ex parte Vallandigham*, 68 U.S. 243 (1863), the Court explained that the power exercised by a military commission was not "judicial . . . in the sense in which judicial power is granted to the courts of the United States." *Id.* at 253 (quoting *United States* v. *Ferreira*, 54 U.S. 40, 48 (1851)). As a result, the Court held that "there is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse [a military court's] proceedings, or the writ of certiorari to revise the proceedings of a military commission." *Vallandigham*, 68 U.S. at 253.

Modern scholars have echoed this perspective on *Marbury* and Article III, section 2. For example, the authors of the leading treatise on federal courts recognize the apparent incompatibility between section 1259 and *Marbury*'s holding. They observe that a "question about the Supreme Court's jurisdiction to review a criminal conviction before a military tribunal is raised by 28 U.S.C. § 1259,"

because the CAAF "is not an Article III court, and the cases it decides do not fall within Article III's definition of the original jurisdiction." Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 294 (7th ed. 2015) ("*Hart & Wechsler*"). And they list serious consequences that would follow if section 1259 were mistaken for an appropriate exercise of this Court's "appellate jurisdiction." If that were the case, as they explain, Congress could conceivably require this Court to directly "review *any* adjudicatory decision — even by a non-Article III federal tribunal"; could "provide for direct Supreme Court review of an NLRB decision in an unfair labor practice proceeding"; and could authorize this Court "to review a decision rendered by" a "multinational tribunal[], in which American officials participate." *Ibid.*

In a similar vein, the authors of one of the primary treatises on civil procedure acknowledge "a major theoretical uncertainty as to the nature of the tribunals whose action is so far judicial that initial revisory jurisdiction [in the Supreme Court] qualifies as 'appellate.'" 16B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4005, p. 149 & n.16 (3d ed. 2012) ("*Wright & Miller*"). Notwithstanding this "uncertainty," they write that "[i]t has been widely supposed that the first review of 'quasi-judicial' determinations by administrative agencies cannot be characterized as appellate," *ibid.* — in other words, that Article III does not empower this Court to exercise direct appellate jurisdiction over executive branch entities such as the CAAF.

The perspective of these two modern treatises echoes the views of one of the leading Twentieth Century authorities on administrative law, Professor Louis Jaffe, who observed over a half-century ago that, in administrative-review cases, the "first reviewing [Article III] court is a court of 'original' jurisdiction" for constitutional analysis, because "[i]t is the first court exercising 'judicial power' in the strict 'Article III' sense." Louis L. Jaffe, *Judicial Control of Administrative Action* 263 n.5 (1965). "[F]or that reason," Jaffe explained, "it would appear that the Supreme Court of the United States cannot be made the first reviewing court" of agency action, "since, following [*Marbury*], it can exercise only such original jurisdiction as the Constitution has conferred upon it." *Ibid.*

At a minimum, these treatises and the Court's opinion in *Vallandigham* highlight the significance of the threshold jurisdictional question — the "major theoretical uncertainty," 16B *Wright & Miller* § 4005, p. 149 & n.16 — addressed in this *amicus* brief. But as *amicus* explains below, this jurisdictional question is not merely significant — in this case, it is dispositive. Under the best reading of Article III and the Court's precedents, the Court lacks jurisdiction to issue the writs in these cases.

BACKGROUND

1. The Constitution divides "the 'powers of the [ ] Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 483 (2010) (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)). Of relevance here, Article II of

the Constitution vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed," Art. II, § 1; *id.*, § 3, in part by "keep[ing] [subordinate Executive Branch] officers accountable — by removing them from office, if necessary," *Free Enterprise Fund*, 561 U.S. at 483. Article II therefore makes Executive Branch officers answerable to the President, although the extent to which Congress may enact statutes specifying that the "President may not remove [such officers] at will but only for good cause" is debated to this day. *See id.* (collecting cases).

In turn, Article III vests the "judicial power of the United States . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The "Judges" of both "the supreme and inferior Courts [] hold their Offices during good Behaviour" and "receive for their Services, a Compensation, which shall not be diminished during their Continuance in office." *Id.* These two attributes — life tenure during "good Behaviour" and undiminishable salary — are shared by all Article III judges. By implication, these provisions establish that Article III judges may be removed only by impeachment and conviction. *See United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 16 (1955).

2. The CAAF is a body established by statute within the Executive Branch. It is described as "a court of record . . . established under article I of the Constitution," though "located for administrative purposes only in the Department of Defense." 10 U.S.C. § 941. The CAAF is composed of "five judges . . . appointed from civilian life by the President, by

and with the advice and consent of the Senate, for a specified [fifteen-year] term." 10 U.S.C. §§ 942(a)-(b). The President may remove a CAAF judge from office for neglect of duty, misconduct, or mental or physical disability. 10 U.S.C. § 942(c).

a. Historically, federal-court review of military tribunals was conducted in collateral proceedings, such as by habeas corpus, rather than direct Supreme Court review. *See* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329, 330 (1984); Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 130 (10th ed. 2013) ("*Supreme Court Practice*") (observing that, before 1983, "there was never any direct judicial review, by the Supreme Court or any other nonmilitary tribunal" of the court-martial system); *see also id.* at 129-35. In 1983, Congress enacted a statute authorizing the filing of petitions for certiorari from the United States Court of Military Appeals (as it was then called) directly to the Supreme Court. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393; *see* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(1), 108 Stat. 2663 (1994) (changing name to the CAAF). At the time section 1259 was first enacted, commentators recognized that it created "a wholly novel relationship between the military justice system and the civilian rule of law" and that, until that date, "the unbroken historical pattern in the United States has been that the judgments of military tribunals are not subject to direct review by Article III courts." Boskey & Gressman, *supra*, at 329-30.

Section 1259 is one of the few statutes that Congress has enacted to govern the Supreme Court's

jurisdiction. In addition to section 1259, Congress has enacted a statute to govern the scope of the Court's "original jurisdiction." 28 U.S.C. § 1251. Congress has also authorized the exercise of the Court's "appellate jurisdiction" in cases rendered by three classes of courts: inferior federal tribunals, *see* 28 U.S.C. § 1253 (three-judge district courts), 28 U.S.C. § 1254 (courts of appeal), 50 U.S.C. § 1803(b) (Foreign Intelligence Surveillance Court of Review); state courts (defined to include the Court of Appeals for the District of Columbia), *see* 28 U.S.C. § 1257; and territorial courts, *see* 28 U.S.C. § 1258 (Puerto Rico), 28 U.S.C. § 1260 (Virgin Islands), 48 U.S.C. § 1424-2 (Guam), 48 U.S.C. § 1824 (Northern Mariana Islands).

Thus, as things currently stand, this Court may exercise direct "appellate jurisdiction" from Article III courts, state courts (including the Court of Appeals for the District of Columbia), territorial courts, and one "Executive Branch entity," *Edmond*, 520 U.S. at 664 & n.2 — the CAAF.

b. Despite the CAAF's Article II status, this Court has reviewed CAAF cases on several occasions pursuant to section 1259. *See, e.g.*, *United States* v. *Denedo*, 556 U.S. 904 (2009); *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999); *United States* v. *Scheffer*, 523 U.S. 303 (1998); *Edmond* v. *United States*, 520 U.S. 651 (1997); *Loving* v. *United States*, 517 U.S. 748 (1996); *Ryder* v. *United States*, 515 U.S. 177 (1995); *Davis* v. *United States*, 512 U.S. 452 (1994); *Weiss* v. *United States*, 510 U.S. 163 (1994); *Solorio* v. *United States*, 483 U.S. 435 (1987).

This Court has never passed, however, on the constitutionality of its authority to review the CAAF

directly. *See Hart & Wechsler* 294 (noting that "the Supreme Court has reviewed decisions of the [CAAF] without addressing th[e] jurisdictional issue" addressed in this brief). The jurisdictional issue, therefore, remains an open question of law. *See, e.g., Arizona Christian School Tuition Org.* v. *Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.").

3. These cases involve writs sought by the petitioners to correct decisions made by the CAAF. *See* Pet. Br. 12-17. In two of the cases, the Court directed the parties to address "[w]hether this Court has jurisdiction . . . under 28 U.S.C. § 1259(3)." In the third case, the Court did not direct the parties to address an antecedent jurisdictional question. *See* Pet. Br. 17, 24 n.16.

Amicus respectfully submits that the Court should dismiss all three writs for lack of Article III jurisdiction. That question is logically antecedent to, and must be addressed before this Court can reach, the merits in any of the three cases. *See, e.g., Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). In so arguing, *amicus* takes no position on the substantive issue raised by petitioners, nor on the statutory jurisdictional question that this Court directed the parties to address. *Amicus*' sole interest is in the

appropriate boundaries of this Court's jurisdiction under Article III of the Constitution.

ARGUMENT

Under Article III, Section 2, this Court lacks authority to issue writs directly to executive branch officers such as the members of the Court of Appeals for the Armed Forces.

As this Court has explained, "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269, 274 (2008); *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). Here, it is readily apparent that the Court lacks "original jurisdiction" over these cases, because they do not present the kind of case enumerated in Article III, section 2. *See* U.S. Const. art. III, § 2 (specifying "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party"); The Federalist No. 81, p. 549 (J. Cooke ed. 1961) (A. Hamilton) (arguing that "the original jurisdiction of the supreme court would be confined to two classes of causes" and that in "all other causes of federal cognizance, the original jurisdiction would appertain to the inferior tribunals, and the supreme court would have nothing more than an appellate jurisdiction").

Nor can the Court exercise "appellate jurisdiction" over the petitions, because the Court's precedents limit the exercise of such jurisdiction to cases arising from an earlier exercise of the "judicial Power" by a court. Such a judicial disposition may occur in a lower Article III court; in a state court, *see*

Martin v. *Hunter's Lessee*, 14 U.S. 304 (1816); or in a territorial court (as well as the Court of Appeals for the District of Columbia), *see, e.g.*, *United States* v. *Coe*, 155 U.S. 76, 86 (1894); *Palmore* v. *United States*, 411 U.S. 389 (1973). But the CAAF and its members, like James Madison, do not fall in any of these categories.

A. *Marbury* v. *Madison* prohibits this Court from exercising direct "appellate jurisdiction" over executive branch officers.

In *Marbury*, the Court confronted the question whether it had jurisdiction under Article III, section 2, to issue a writ of mandamus directly to an executive branch official, without a preliminary consideration of the merits by another court. 5 U.S. at 173. The dispute arose when James Madison, the newly installed Secretary of State to incoming President Thomas Jefferson, failed to deliver a commission to William Marbury, a nominee to a five-year term as Justice of the Peace to the District of Columbia by the outgoing President, John Adams. Marbury had been confirmed by the lame-duck Federalist Senate, and his commission was signed — but not delivered — before Adams left office. Marbury asked the new Administration for his commission, and was refused. In an effort to compel the commission's delivery, Marbury turned to this Court to direct a writ of mandamus at Madison.

In an opinion authored by Chief Justice Marshall, the Court dismissed the petition for lack of jurisdiction. The Court first held that it could not exercise "original jurisdiction" over the case because it was outside of the specific class of cases enumerated

in Article III. *See* 5 U.S. at 174. The Court then held that it lacked "appellate jurisdiction" to issue the writ, because an "essential criterion" of such jurisdiction was "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Id.* at 175; *see, e.g.*, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821) (characterizing a "suit" as "the prosecution of some demand in a Court of justice"). A writ of mandamus could be "directed to courts," Chief Justice Marshall reasoned, but "to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction." 5 U.S. at 175-76.

As a result, under *Marbury*, for jurisdiction to be proper, the Court's action must be "appellate" in the sense that the Court is supervising an earlier decision by a lower court. In his *Commentaries on the Constitution*, Justice Story made this point with the utmost clarity. As Story explained:

> In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies, that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form in which the legislature may choose to prescribe; but, still, the substance must exist, before the form can be applied to it. To operate at all, then, under the constitution of the

> United States, it is not sufficient that there has been a decision by some officer, or department of the United States; it must be by one clothed with judicial authority, and acting in a judicial capacity. A power, therefore, conferred by congress on the Supreme Court, to issue a mandamus to public officers of the United States generally, is not warranted by the constitution; for it is, in effect, under such circumstances, an exercise of original jurisdiction.

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1755, at 627 (1833) (footnotes omitted). Accordingly, without another court exercising "judicial Power" between reviewed executive action and this Court's consideration, the Court's exercise of jurisdiction is not "appellate" in the sense demanded by Article III.

B. Under this Court's precedents, the CAAF's members are executive branch officers over whom this Court cannot exercise direct "appellate jurisdiction."

In a variety of contexts, this Court has applied — and has reinforced — *Marbury*'s holding. Taken together, these precedents establish that the Court cannot issue a writ of certiorari directly to the CAAF in a case that would not otherwise fall within the scope of the Court's original jurisdiction.

1. *Courts-martial and military commissions.* In *Ex parte Vallandigham*, 68 U.S. 243 (1863), the Court dismissed for lack of jurisdiction a petition for certiorari that was "to be directed to the Judge

Advocate General of the Army of the United States, to send up to [the Supreme Court], for its review, the proceedings of a military commission." *Id.* at 243. The case arose out of Ohio Congressman Clement Vallandigham's conviction by military commission for criticizing President Lincoln during the midst of the Civil War. *See id.* at 244. Vallandigham sought a writ from the Court, but the Court responded that it had "no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the United States Army, commanding a military department." *Id.* at 248.

The Court reasoned that it lacked both original and appellate jurisdiction over the petition. With respect to original jurisdiction, the Court explained that it could not "without disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinion upon the proceedings of a military commission." *Id.* at 251-52. That was because, as the Court explained, Article III's enumeration of cases within the Court's "original jurisdiction" "has always been considered restrictive of any other original jurisdiction." *Id.* at 252.

Nor, the Court explained, was the petition "within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court." *Id.* at 251. It was "not in law or equity within the meaning of those terms as used in" Article III, nor was the "military commission a court within the meaning of the 14th section of the Judiciary Act of 1789." *Id.*; *see Hart & Wechsler* 294 (characterizing *Vallandigham* as holding "that neither section 14 of the First Judiciary Act nor Article III permitted the Supreme Court to

entertain a petition for a writ of certiorari directly from a military commission that had convicted the prisoner of disloyalty during the Civil War"). *Compare Ex parte Milligan*, 71 U.S. 2 (1866) (reviewing legality of military commission when defendant first filed a habeas corpus petition in lower court and appealed from its judgment); *see* David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. Chi. L. Rev. 131, 134 n.16 (1984) (recognizing that *Vallandigham* held that the Court "had no jurisdiction to review directly the judgment of a military commission" and distinguishing the Court's assertion of jurisdiction in *Milligan* on this basis).

Subsequent cases repeatedly reaffirmed *Vallandigham* on this jurisdictional point. In *In re Vidal*, 179 U.S. 126 (1900), for example, the Court rejected an application for leave to file a petition for certiorari to review the proceedings of a military tribunal established by the commanding officer of Puerto Rico. The Court held that it was not "empowered to review the proceedings of military tribunals by certiorari" and that military tribunals were not "courts with jurisdiction in law or equity, within the meaning of those terms as used in the 3d article of the Constitution." *Id.* at 127; *see Duncan* v. *Kahanamoku*, 327 U.S. 304, 309 (1946) (remarking that the court-martial sentences at stake in the case "were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system"); *In re Yamashita*, 327 U.S. 1, 8 (1946) (recognizing that "the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court");

see also Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 186-87 (1962) ("[T]he Supreme Court has adhered consistently to the 1863 holding of *Ex parte Vallandigham* that it lacks jurisdiction to review by certiorari the decisions of military courts.").

2. *Court of Claims.* In *Gordon* v. *United States*, 69 U.S. 561 (1864) (also reported at 117 U.S. 697 (1884)), immediately before his death, Chief Justice Taney prepared and circulated to the Court an opinion addressing the scope of the Court's "appellate jurisdiction." 117 U.S. at 697 (noting that Taney "prepared an opinion" but died before the judges met); *see, e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 569 (1962) (plurality) (observing that Taney's opinion was "prepared before his death and circulated among, but not adopted by, his brethren"). Although the opinion itself was not adopted by the full Court in the wake of Taney's death, it was released some time later and it formed the basis for the Court's disposition of the case for want of appellate jurisdiction. 117 U.S. at 697.

The *Gordon* opinion declared that Article III prohibited Congress from assigning the Court direct "appellate jurisdiction" over the Court of Claims. In 1863, Congress had created the Court of Claims to render final judgments on monetary claims against the government, with an avenue for direct appeal to the Supreme Court. *See* Act of Mar. 3, 1863, c. 92, §§ 5, 14, 12 Stat. 765, 766, 768; *see also Glidden*, 370 U.S. at 552-54 (plurality) (summarizing development of the Court of Claims). But the new tribunal's Article III status was questionable. Because the opinion reasoned that "all that the Court [of Claims] [wa]s authorized to do is to certify its opinion to the

Secretary of the Treasury," it concluded that the Court of Claims' judgments were not "final and conclusive upon the rights of the parties" and hence inconsistent with Article III's "judicial power." *Gordon*, 69 U.S. at 702; *see also Hayburn's Case*, 2 U.S. 408 (1792).

A necessary consequence of that reasoning, *Gordon* noted, was that the Court of Claims was not a "court" within the meaning of the Constitution — and that the Supreme Court could not exercise "appellate jurisdiction" from judgments that it rendered. The Court's "appellate jurisdiction," the opinion reasoned, "is given only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States." 69 U.S. at 702. As *Gordon* explained, "Congress cannot extend the appellate power of [the Supreme] Court beyond the limits prescribed by the Constitution, and can neither confer nor impose on [the Court] the authority or duty of hearing and determining an appeal from a Commissioner or Auditor, or any other tribunal exercising only special powers under an act of Congress." *Ibid.* "The inferior court [ ] from which the appeal is taken," in other words, "must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect." *Ibid.*

Notwithstanding its curious status because of Chief Justice Taney's death (and the *Gordon* opinion's delayed publication), the opinion in *Gordon* was understood to reflect the contemporaneous views of the Court's members and was accorded precedential

status by both Congress and future courts. The Court's opinion in *United States* v. *Jones*, 119 U.S. 477 (1886), summarized the Court's "records" of Chief Justice Chase's announcement of the judgment in *Gordon* as follows: "We think that the authority given to the head of an executive department by necessary implication, in the fourteenth section of the amended court of claims act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power, *from the exercise of which alone appeals can be taken to this court.*" *Id.* at 478 (emphasis added). In the wake of *Gordon*, Congress repealed the provision allowing the Secretary of the Treasury to estimate the amount to be paid on claims, *see* Act of Mar. 17, 1866, c. 19, § 1, 14 Stat. 9, and with that legislative fix in place, the Court exercised "appellate jurisdiction" over the Court of Claims in *De Groot* v. *United States*, 72 U.S. 419 (1866).

Subsequent opinions — including those by members of the *Gordon* Court — characterized the reasoning that led to the dismissal of the petition in *Gordon* in a manner consistent with Taney's opinion. *See United States* v. *Alire*, 73 U.S. 573, 576 (1867) (characterizing *Gordon* as denying jurisdiction "on account of the power of the executive department over its judgment," which was later "repealed"); *United States* v. *O'Grady*, 89 U.S. 641, 647 (1874) (characterizing *Gordon* as "declin[ing] to take jurisdiction of such appeals, chiefly for the reason that the act practically subjected the judgments of the Supreme Court rendered in such cases to the re-examination and revision of the Secretary of the Treasury" and noting that the offensive provision had been repealed); *Langford* v. *United States*, 101 U.S. 341, 344-45 (1879) ("An act of Congress removing this

objectionable feature having passed the year after [*Gordon*], the appellate power of this court has been exercised ever since."); *see also Jones*, 119 U.S. at 478 ("It is manifest, therefore, not only that the jurisdiction was originally denied solely on the ground of the objectionable fourteenth section, but that, with this section repealed, nothing has ever been supposed until now to stand in the way of our taking cognizance of such cases.").

3. *Habeas corpus.* In a series of cases, the Court made clear that it can exercise "original habeas" jurisdiction only if a party has previously filed a case in a lower court. In *Ex parte Bollman*, 8 U.S. 75 (1807), the Court concluded that it had jurisdiction over a habeas corpus petition, which was appropriately viewed as a writ for "the revision of a decision of an inferior court." *Id.* at 100-01. At the same time, the Court recognized that *Marbury* "decided that this Court would not exercise original jurisdiction except so far as that jurisdiction was given by the Constitution." *Id.* at 100. The Court understood the issuance of a writ of habeas corpus as not transgressing *Marbury* precisely because the "writ must always be for the purpose of revising th[e] decision [regarding whether an individual shall be imprisoned], and therefore appellate in its nature." *Id.* at 101; *Ex parte Yerger*, 75 U.S. 85 (1868); *see also* George L. Haskins, *Foundations of Power: John Marshall, 1801-1815*, at 257 (Oliver Wendell Holmes Devise 1981) (reasoning that *Bollman* concluded that, if the habeas applications had been presented "to the Supreme Court in the first instance, . . . a case outside the original jurisdiction granted the Court by Article III, as in *Marbury* v. *Madison*, would have been

presented, and the congressional grant of jurisdiction would have been unconstitutional").

By contrast, where the habeas petition did not request "review of the *judicial decision* of some inferior officer or court," the Court denied jurisdiction, reasoning that it could not "issue a writ of *habeas corpus* except under its appellate jurisdiction." *Ex parte Hung Hang*, 108 U.S. 552, 553 (1883); *see also Ex parte Barry*, 43 U.S. 65, 65 (1844) (Story, J.) (denying habeas petition, noting that "[n]o application has been made to the Circuit Court of the United States for the district of New York," and reasoning that the Court lacked appellate jurisdiction and the case "is one avowedly and nakedly for the exercise of original jurisdiction by this court").

4. *The Court of Customs and Patent Appeals and the Court of Claims (again).* In a temporary departure from some of the principles explained above, the Court in *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929), and in *Williams* v. *United States*, 289 U.S. 553 (1933), held that the Court of Customs Appeals and the Court of Claims respectively were not Article III tribunals, even though the Court had exercised "appellate jurisdiction" over them, *see, e.g.*, *Five Per Cent. Discount Cases*, 243 U.S. 97 (1917). In doing so, these decisions implied that the Supreme Court could exercise "appellate jurisdiction" directly over non-Article III federal bodies, such as the two courts at issue in those cases.

Justice Harlan's plurality opinion in *Glidden Company* v. *Zdanok*, however, returned the Court's Article III jurisprudence to its historical moorings by expressly disapproving of and overturning both *Bakelite* and *Williams*. *See* 370 U.S. at 584. The

plurality opinion explained that both the Court of Customs and Patent Appeals (the successor court to the Court of Customs Appeals) and the Court of Claims were — and had always been — Article III courts.

In doing so, Justice Harlan made several statements strongly indicating an understanding of this Court's "appellate jurisdiction" consistent with the perspective explained in this brief. He observed that "striking evidence of [the Court's early] understanding that the Court of Claims had been vested with judicial power" could be found in the Court's "accept[ance] [of] appellate jurisdiction over what was, necessarily, an exercise of the judicial power which alone it may review." *Id.* at 554 (citing *Marbury*). Likewise, Justice Harlan argued that the Court of Claims possessed "judicial power whose exercise is amenable to appellate review" in this Court, *id.* at 566, and that this Court "took unquestioned appellate jurisdiction" from the Court of Customs and Patent Appeals "on numerous occasions, *id.* at 575. These statements were made in the context of an attempt to argue that the Court of Claims and the Court of Customs and Patent Appeals were, in fact, Article III tribunals. By claiming that this Court's exercise of appellate jurisdiction over the two courts established their Article III status, Justice Harlan logically implied that the Court cannot review actions that are *not* "an exercise of the judicial power."

C. Fundamental separation-of-powers principles preclude this Court from issuing writs to executive branch officers.

Fundamental separation-of-powers principles reinforce the precedents of this Court and compel the conclusion that this Court may not issue writs directly to executive branch officers such as the members of the CAAF. The Constitution vests the "executive power" in a single President, U.S. Const. art. II, and the "judicial power" in this Court and in inferior Article III tribunals, U.S. Const. art. III. State and territorial courts, as aspects of sovereignty, also exercise "judicial Power" over discrete geographic areas. But executive branch bodies do not. To say otherwise would muddy the waters between the three branches of government — contrary to precedent and constitutional provision.

1. Article III authorizes this Court to take direct "appellate jurisdiction" of cases from inferior Article III courts, state courts and territorial courts, including the Court of Appeals for the District of Columbia. The Constitution's grant of "appellate jurisdiction" to this Court and vesting of the "judicial Power of the United States" in Article III courts, taken together, confer on the Supreme Court the authority to review and to revise lower federal court judgments. In addition, this Court held at an early date in *Martin* v. *Hunter's Lessee*, 14 U.S. 304 (1816), that it had the authority to correct errors by a State's highest court. Justice Story, writing for the Court, reasoned that "the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state

courts," *id.* at 340, and that the view that the Court could take appellate jurisdiction over state judgments was "uniformly and publicly avowed by [the Constitution's] friends, and admitted by its enemies, as the basis of their respective reasonings," *id.* at 351; *see also* The Federalist No. 82, p. 555 (J. Cooke ed. 1961) (A. Hamilton) (reasoning that, in "instances of concurrent jurisdiction" between the "national and State courts . . . an appeal would certainly lie from the latter to the Supreme Court of the United States").

While territorial courts have long been understood to pose complex constitutional questions, they are best understood within the federal scheme as functional equivalents of state courts where state government does not exist. In *American Insurance Co.* v. *Canter*, 26 U.S. 511 (1828), Chief Justice Marshall reasoned that, although territorial courts were not composed of judges with Article III's structural protections, those courts were "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *Id.* at 546; *see* U.S. Const. art. IV, § 2 (providing that Congress has the "power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States"). Territorial courts thus stand in the same position for constitutional purposes as state courts precisely because "[i]n legislating for them, Congress exercises the combined powers of the general, *and of a state government.*" *Canter*, 26 U.S. at 546 (emphasis added); *see, e.g.*, *Benner* v. *Porter*, 50 U.S. 235, 242 (1850) (observing that the territories generally "are not organized under the Constitution, nor subject to

its complex distribution of the powers of government," but rather "are the creations, exclusively, of the legislative department, and subject to its supervision and control"). Based on that logic, this Court has asserted "appellate jurisdiction" over courts in the territories. *See, e.g.*, *United States* v. *Coe*, 155 U.S. 76, 85 (1894) (reasoning that Congress could establish territorial courts "in virtue of the general right of sovereignty, which exists in the government over the territories"). And the Court has, by the same logic, exercised appellate jurisdiction over courts within the District of Columbia. *See Palmore* v. *United States*, 411 U.S. 389 (1973); *O'Donoghue* v. *United States*, 289 U.S. 516 (1933); U.S. Const. art. I, § 8, cl. 17 (authorizing Congress to exercise "exclusive legislation" over a federal "District" that would "become the seat of the government of the United States").

The common thread running through state courts, territorial courts, and the District of Columbia courts is the notion of "judicial Power" over a discrete geographic area. *Cf.* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 575-76 (2007) (noting that both the territories and the District of Columbia are "discrete geographic enclaves that are not within the jurisdiction of any state and over which Congress has special authority"). Thus, "[i]t should be obvious that the powers exercised by territorial courts tell us nothing about the nature of an entity," such as the CAAF, "which administers the general laws of the Nation." *Freytag*, 501 U.S. at 914 (Scalia, J., concurring); *see also Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 75-76 (1982) (plurality) ("*Palmore* was concerned with the courts of the District of Columbia, a unique federal

enclave. . . . This is a power that is clearly possessed by Congress only in limited geographic areas.").

2. By contrast, as this Court has already determined, notwithstanding its name, the CAAF is an "Executive Branch entity" for relevant constitutional purposes. *Edmond* v. *United States*, 520 U.S. 651, 664 & n.2 (1997). Given that its members lack Article III's structural protections for judges, that conclusion is unassailable. The CAAF and its members do not exercise "judicial Power" from which this Court may exercise direct review, but rather the "executive Power" of the Executive Branch.

This conclusion is entirely consistent with longstanding precedent. In *Vallandigham*, for example, the Court recognized that the officers of military commissions were within the Executive Branch. As the Court put it, while "powers conferred by Congress" on military officials could at first glance appear "judicial in their nature, for judgment and discretion must be exercised," such authority was not genuinely "judicial . . . in the sense in which judicial power is granted to the courts of the United States." 68 U.S. at 253 (quoting *Ferreira*, 54 U.S. at 48); *see* Carl B. Swisher, *The Taney Period, 1836-64*, at 929 (Oliver Wendell Holmes Devise 1974) (noting the argument in *Vallandigham* that, because "[c]courts-martial and military commissions exercised their power from sources under the Constitution other than the judicial power," "direct review would [] be an exercise of the Court's original, not appellate, jurisdiction, beyond the authority conferred by Article III"). *Vallandigham*'s holding on this point echoed the Court's prior determination in *Dynes* v. *Hoover*, 61 U.S. 65 (1857), that the power to convene courts-

martial "is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States" and "that the two powers are entirely independent of each other." *Id.* at 79.

Military commentators also observed that courts-martial exercised the "executive power," not the "judicial power." In his classic work on military law, Colonel William Winthrop, for example, remarked that courts-martial are "not a part of the judiciary but an agency of the executive department" and that "a court-martial is not a court in the full sense of the term." *Military Law and Precedents* 49 (2d ed. 1920) (emphasis removed and capitalization altered). As Winthrop explained:

> Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the "inferior" courts which Congress "may from time to time ordain and establish." . . .
>
> Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and

> navy and enforcing discipline therein and utilized under his orders or those of his authorized military representatives.
>
> Thus indeed, strictly, a court-martial is not a court in the full sense of the term, or as the same is understood in the civil phraseology.

Id. In a similar vein, Brigadier-General George Breckenridge Davis reasoned that "[c]ourts-martial are no part of the judiciary of the United States, but simply instrumentalities of the executive power." George B. Davis, *A Treatise on the Military Law of the United States* 15 (2d ed. 1909).

To be sure, it is no doubt true that the CAAF, like other comparable bodies within the Executive Branch, "'adjudicate[s],' *i.e.*, [ ] determine[s] facts, appl[ies] a rule of law to those facts, and thus arrive[s] at a decision." *Freytag*, 501 U.S. at 909 (Scalia, J., concurring). That is why, for example, this Court noted that the President's role in reviewing the proceedings of courts-martial is a "judicial" power that he must exercise personally. *Runkle* v. *United States*, 122 U.S. 543, 557 (1887); *cf. President's Approval of the Sentence of a Court Martial*, 11 Op. Att'y Gen. 19, 21 (1864) ("[T]he President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially."). The critical point, however, is that "[t]o be a federal officer and to adjudicate are *necessary* but not *sufficient* conditions for the exercise of federal judicial power." *Freytag*, 501 U.S. at 909 (Scalia, J., concurring) (emphasis added); *see, e.g.*, *City of Arlington* v. *FCC*, 569 U.S. 290, 304 n.4 (2013)

(observing that agency adjudications may take "'judicial' forms, but they are exercises of — indeed, under our constitutional structure they *must be* exercises of — the 'executive Power'"); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1855) (observing that "it is not sufficient to bring [a] matter[] under the judicial power, that [it] involve the exercise of judgment upon law and fact").

Likewise, to be sure, the CAAF is described as having been "established under article I of the Constitution." 10 U.S.C. § 941. But that statutory designation does not alter the CAAF's position within the Executive Branch, nor did the CAAF's judges "magically acquire the judicial power" by label. *Freytag*, 501 U.S. at 912 (Scalia, J., concurring). Because they lack life tenure, because their salaries may be diminished, and because they are removable by the President on various statutory grounds (including "neglect of duty"), they cannot exercise the federal Government's "judicial Power," nor do they exercise the "judicial Power" of a state or territory. In this respect, it is substance, not form, that matters. *See Crowell* v. *Benson*, 285 U.S. 22, 53 (1932) (observing that, in deciding whether Congress has exceeded its constitutional authority, "regard must be had . . . not to mere matters of form, but to the substance of what is required"). In this instance, the substance cannot be clearer: The members of the CAAF are subordinate to — indeed, they are removable by — the President. As this Court noted with respect to a similar statutory removal provision, that removal may occur "for any number of actual or perceived transgressions" — making the members of the CAAF Executive Branch officers by any metric. *Bowsher* v. *Synar*, 478 U.S. 714, 729 (1986).

3. Allowing this Court to direct executive branch officers undermines the constitutional scheme by heightening the risk, on the one hand, that a multimember body might directly oversee the Executive Branch instead of the Constitution's single Chief Magistrate and, on the other hand, that Congress may assign to, and thereby inundate this Court with, the routine, direct review of agency decisionmaking. *See Hart & Wechsler* 294 (speculating whether Congress could require this Court to "review *any* adjudicatory decision — even by a non-Article III federal tribunal" or a "multinational tribunal[], in which American officials participate"). *Amicus* can hypothesize two alternative, possible approaches to the question addressed in this brief. Respectfully, neither approach comports with the existing legal framework or makes sense of our system of separated powers.

a. First, one might attempt to distinguish between some executive branch officers (such as James Madison in *Marbury* or the military tribunal in *Vallandigham*) from whose decisions this Court may not exercise "appellate jurisdiction" and other executive branch officers (such as the CAAF's members) from whose decisions this Court may exercise such "appellate jurisdiction." That distinction, presumably, would hinge on the "court-like" functions and formality of the latter officers: whether they exercise judgment, develop a record, and seek to rule on a concrete dispute in an impartial fashion. It may also hinge on the label that Congress gives to a particular body.

Leaving to one side the sheer unpredictability of such a distinction — which would require this Court

to distinguish between more and less "court-like" bodies that are located within the Executive Branch — it is inconsistent with this Court's precedents. As explained above, it is substance, not labeling, that ought to guide this Court's separation-of-powers inquiry. As explained above, the substance of the CAAF's functions cuts decisively in favor of viewing them as executive branch officers.

And as explained above, the precedents cut in that direction, too. To take just one example, Chief Justice Taney's opinion in *Gordon* (which the full Court later embraced) refused to exercise "appellate jurisdiction" from an early incarnation of the Court of Claims, notwithstanding Congress's decision to label the "body" a court and its members "judges." The opinion explained that "Congress cannot extend the appellate power of [the Supreme] Court beyond the limits prescribed by the Constitution, and can neither confer nor impose on [the Court] the authority or duty of hearing and determining an appeal from a Commissioner or Auditor, or any other tribunal exercising only special powers under an act of Congress." 69 U.S. at 702.

Moreover, the muddying of the waters between Article III courts and such court-like bodies can only have deleterious effects on the Constitution's separation of powers. If this Court were to hold that the CAAF exercises "judicial Power," it would naturally raise the question whether the President could properly remove its members. *Cf. Kuretski* v. *CIR*, 755 F.3d 929, 932 (D.C. Cir. 2014) (Srinivasan, J.) (rejecting challenge to provision authorizing President to remove judges of the Tax Court and reasoning that the Tax Court "exercises Executive

authority as part of the Executive Branch"). As the D.C. Circuit recently observed in *Kuretski*, "the constitutional status of the Tax Court mirrors that of the Court of Appeals for the Armed Forces," *id.* at 944 — thus showing the serious potential ramifications of a holding that "court-like" entities within the Executive Branch wield the "judicial Power of the United States."

b. Second, one might argue that the test for when the Supreme Court may exercise "appellate jurisdiction" under Article III is identical to the test that the Court has announced for when adjudication in a non-Article III body is permissible. The Court has identified three circumstances in which a non-Article III judge or court may be given adjudicatory authority that is conclusive in some shape or form: (1) territorial courts, (2) courts-martial, and (3) cases involving a "public right." *Northern Pipeline*, 458 U.S. at 64-70 (plurality); *cf. Stern* v. *Marshall*, 564 U.S. 462 (2011).

But this approach seems equally problematic. For one thing, it fails to take account of *Vallandigham*, and other related cases, which show that the Court has not historically exercised "appellate jurisdiction" from courts-martial and other military tribunals. For another, it would be subject to no plausible limiting principle that would distinguish between the cases decided by the CAAF and the many types of "public rights" cases decided in agency adjudications, over which (under this theory) the Court would presumably also be given direct review. *See, e.g.*, Hart & Wechsler 294 (reasoning that Congress could conceivably require this Court to directly "review *any* adjudicatory decision — even by a non-Article III federal tribunal"; could "provide for

direct Supreme Court review of an NLRB decision in an unfair labor practice proceeding"; and could authorize this Court "to review a decision rendered by" a "multinational tribunal[], in which American officials participate").

3. None of the analysis in this brief suggests that this Court can exercise no control over the court-martial system. Quite the contrary, were the Court to accept *amicus*' argument, review would be available by way of collateral attack, such as habeas corpus proceedings initiated in federal district court, in the same manner that Article III review of courts-martial had been accomplished for much of the Nation's history. Review of certain issues might also be available through other avenues. *See, e.g.*, Pet. Br. 12 n.13. Moreover, to the extent that Congress desired a system of direct Article III review, it could channel cases through the federal courts of appeal before they reached this Court, as Congress has done in a wide variety of schemes authorizing judicial review of agency action in the federal courts of appeals. Alternatively, Congress could bestow full Article III status on the judges of the CAAF. *See Supreme Court Practice* 131 n.126 (observing that such suggestions have been made in the past).

What Congress may *not* do is create a statutory scheme that confers jurisdiction on this Court to review directly executive branch entities such as the CAAF. Such a scheme exceeds the boundaries of Article III and violates the core constitutional holding of *Marbury* v. *Madison*.

CONCLUSION

The writs of certiorari should be dismissed for lack of Article III jurisdiction.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 1259

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

> (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
>
> (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
>
> (3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.
>
> (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

10 U.S.C. § 941

There is a court of record known as the United States Court of Appeals for the Armed Forces. The court is established under article I of the Constitution. The court is located for administrative purposes only in the Department of Defense.

10 U.S.C. § 942

(a) Number.--The United States Court of Appeals for the Armed Forces consists of five judges.

(b) Appointment; qualification.--(1) Each judge of the court shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, for a specified term determined under paragraph (2). A judge may serve as a senior judge as provided in subsection (e).
(2) The term of a judge shall expire as follows:
(A) In the case of a judge who is appointed after January 31 and before July 31 of any year, the term shall expire on July 31 of the year in which the fifteenth anniversary of the appointment occurs.
(B) In the case of a judge who is appointed after July 31 of any year and before February 1 of the following year, the term shall expire fifteen years after such July 31.
(3) Not more than three of the judges of the court may be appointed from the same political party, and no person may be appointed to be a judge of the court unless the person is a member of the bar of a Federal court or the highest court of a State.
(4) A person may not be appointed as a judge of the court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force.

(c) Removal.--Judges of the court may be removed from office by the President, upon notice and hearing, for—

(1) neglect of duty;
(2) misconduct; or
(3) mental or physical disability.
A judge may not be removed by the President for any other cause.

(d) Pay and allowances.--Each judge of the court is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Courts of Appeals.

(e) Senior judges.--(1)(A) A former judge of the court who is receiving retired pay or an annuity under section 945 of this title (article 145) or under subchapter III of chapter 83 or chapter 84 of title 5 shall be a senior judge. The chief judge of the court may call upon an individual who is a senior judge of the court under this subparagraph, with the consent of the senior judge, to perform judicial duties with the court--
(i) during a period a judge of the court is unable to perform his duties because of illness or other disability;
(ii) during a period in which a position of judge of the court is vacant; or
(iii) in any case in which a judge of the court recuses himself.
(B) If, at the time the term of a judge expires, no successor to that judge has been appointed, the chief judge of the court may call upon that judge (with that judge's consent) to continue to perform judicial duties with the court until the vacancy is filled. A judge who,

upon the expiration of the judge's term, continues to perform judicial duties with the court without a break in service under this subparagraph shall be a senior judge while such service continues.

(2) A senior judge shall be paid for each day on which he performs judicial duties with the court an amount equal to the daily equivalent of the annual rate of pay provided for a judge of the court. Such pay shall be in lieu of retired pay and in lieu of an annuity under section 945 of this title (article 145), subchapter III of chapter 83 or subchapter II of chapter 84 of title 5, or any other retirement system for employees of the Federal Government.

(3) A senior judge, while performing duties referred to in paragraph (1), shall be provided with such office space and staff assistance as the chief judge considers appropriate and shall be entitled to the per diem, travel allowances, and other allowances provided for judges of the court.

(4) A senior judge shall be considered to be an officer or employee of the United States with respect to his status as a senior judge, but only during periods the senior judge is performing duties referred to in paragraph (1). For the purposes of section 205 of title 18, a senior judge shall be considered to be a special government employee during such periods. Any provision of law that prohibits or limits the political or business activities of an employee of the United States shall apply to a senior judge only during such periods.

(5) The court shall prescribe rules for the use and conduct of senior judges of the court. The chief judge of the court shall transmit such rules, and any

amendments to such rules, to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives not later than 15 days after the issuance of such rules or amendments, as the case may be.

(6) For purposes of subchapter III of chapter 83 of title 5 (relating to the Civil Service Retirement and Disability System) and chapter 84 of such title (relating to the Federal Employees' Retirement System) and for purposes of any other Federal Government retirement system for employees of the Federal Government--

(A) a period during which a senior judge performs duties referred to in paragraph (1) shall not be considered creditable service;

(B) no amount shall be withheld from the pay of a senior judge as a retirement contribution under section 8334, 8343, 8422, or 8432 of title 5 or under any other such retirement system for any period during which the senior judge performs duties referred to in paragraph (1);

(C) no contribution shall be made by the Federal Government to any retirement system with respect to a senior judge for any period during which the senior judge performs duties referred to in paragraph (1); and

(D) a senior judge shall not be considered to be a reemployed annuitant for any period during which the senior judge performs duties referred to in paragraph (1).

(f) Service of article III judges.--(1) The Chief Justice of the United States, upon the request of the chief judge of the court, may designate a judge of a United States court of appeals or of a United States district court to perform the duties of judge of the United States Court of Appeals for the Armed Forces--

(A) during a period a judge of the court is unable to perform his duties because of illness or other disability;

(B) in any case in which a judge of the court recuses himself; or

(C) during a period when there is a vacancy on the court and in the opinion of the chief judge of the court such a designation is necessary for the proper dispatch of the business of the court.

(2) The chief judge of the court may not request that a designation be made under paragraph (1) unless the chief judge has determined that no person is available to perform judicial duties with the court as a senior judge under subsection (e).

(3) A designation under paragraph (1) may be made only with the consent of the designated judge and the concurrence of the chief judge of the court of appeals or district court concerned.

(4) Per diem, travel allowances, and other allowances paid to the designated judge in connection with the performance of duties for the court shall be paid from funds available for the payment of per diem and such allowances for judges of the court.

(g) Effect of vacancy on court.--A vacancy on the court does not impair the right of the remaining judges to exercise the powers of the court.